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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

MICHAEL J. KOTULA,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The U.S. Court of Appeals for the Sixth Circuit has affirmed the conviction of Michael J. Kotula for a tax conspiracy pursuant to 18 U.S.C. §371. This conviction raises three questions which warrant review by this Court:

1. Whether admittedly "testimonial" co-conspirator statements, in the form of prior civil deposition and trial testimony, are exempt from the unavailability and cross-examination requirements of the Confrontation Clause, because the statements meet the requirements of Federal Rule of Evidence 801(d)(2)(E)?

2. Whether a defendant's right to a fair trial is violated by denial of his motion for severance, thereby precluding the defendant from introducing a co-defendant's essential exculpatory testimony which would have been available only in a severed trial?

3. Whether the district court, on a tax conspiracy count, erred in failing to give any instruction on the essential element of "willfulness," while denying the defendant's requested good faith instruction that included the government's burden to negate the defendant's good faith, as required by the U.S. Supreme Court's decision in *United States v. Cheek*?

PARTIES TO PROCEEDING

The United States and Michael J. Kotula are parties to this case and were parties in the case in the district court and the U.S. Court of Appeals for the Sixth Circuit.

Gary Harris and Tamara Schwenker Harris were co-defendants of petitioner Kotula at trial and co-appellants in the Sixth Circuit, and counsel is informed that each intends to petition for certiorari, but will first be seeking extensions from the Circuit Justice.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael J. Kotula prays that a writ of certiorari issue to review a judgment of the U.S. Court of Appeals for the Sixth Circuit affirming his conviction for tax conspiracy. Review is appropriate pursuant to Rule 10 of the Rules of this Court because the decision of the Sixth Circuit conflicts with decisions of this Court and several courts of appeals regarding application of the Constitution and federal statutes. See S.Ct.R. 10(a), (c).

OPINIONS BELOW

The decision of the district court denying Kotula's motion for judgment of acquittal and new trial is reprinted at App. 1, and is not otherwise published. The Sixth Circuit's decision is reprinted at App. 52, and is unofficially published at *United States v. Harris*, 200 Fed.Appx. 472, 2006 WL 2873398, 98 A.F.T.R.2d 2006-7191, 2006-2 USTC ¶50,616 (6th Cir. 2006). The Sixth Circuit's order denying rehearing and rehearing en banc is reprinted at App. 166, and is not otherwise published.

STATEMENT OF JURISDICTION

The Sixth Circuit rendered its decision on October 10, 2006 and denied petitioner's timely filed petition for rehearing and rehearing en banc on April 19, 2007. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him, ...

18 U.S.C. §371 is reprinted at App. 172.

Federal Rule of Criminal Procedure 14 is reprinted at App. 172.

STATEMENT OF THE CASE

On July 8, 2003, defendant Michael J. Kotula was indicted on two counts, conspiracy to defraud the IRS (Count 1) and attempted tax evasion (Count 5). Co-defendants Gary Harris and Tamara Schwentker Harris were also charged in the conspiracy count, which alleged a conspiracy from January 1, 1994 through July 8, 2003, and Gary Harris (hereinafter "Harris") was charged separately with tax evasion in counts 2, 3, and 4.

Kotula worked as an employee and property manager for Harris and Harris's companies, managing and finding tenants for rental properties. Harris had an office staffed with attorneys and accountants to handle Harris's financial and legal matters. Kotula had no responsibilities in regard to financial or tax matters other than to provide the professionals with information requested.

Harris had previously been convicted of filing a false tax return for 1987 and, pursuant to a plea agreement entered into on November 3, 1997, had pleaded guilty to offenses relating to tax years 1994 through 1997. Harris's plea agreement covered tax years that are alleged to be part of the conspiracy in this case. The government, despite having agreed not to prosecute Harris for the years in issue, obtained the indictment against Harris by asserting that

Harris had breached the plea agreement. Kotula, as an employee of Harris, relied in good faith on the accountants and attorneys, and on Harris's prior resolution of his tax issues by plea agreement as having resolved Harris's disputes with the IRS for the years in question.

The conspiracy was alleged to include Harris's failure to report income from the operation of Conneaut Lake Park, an amusement park, which Harris purchased out of bankruptcy, reopened, and operated. The operation of the Park resulted in civil litigation during which Harris was deposed and testified at the civil trial. The government argued that Harris's operation of the Park was a critical part of the conspiracy charge and that Harris failed to report $800,000 in income from the Park.

The indictment also alleged overt acts to support the conspiracy against Harris, including Harris's alleged use of trusts, corporations, off-shore accounts, disguised consulting fees, and foreign currency. The government admitted that Kotula was not an officer or director of any corporation listed in the indictment nor a trust manager, trustee or fiduciary of any trust other than his own, App. 173, and the district court found that "there was no direct evidence that Defendant conspired with Harris to evade federal taxes." App. 48. The principal acts mentioning Kotula involved payment of legal fees, collection of rents, and routine business activities handled by Kotula to assist Harris's wife and children while Harris was incarcerated.

Prior to trial, Harris signed a declaration under penalty of perjury that he was willing to testify that petitioner Kotula was, in fact, just an employee and property manager for Harris and had no involvement with the matters alleged in the indictment. App. 168. Kotula filed a motion for severance, attaching the declaration in which Harris stated

that he would waive his Fifth Amendment privilege and testify in a severed trial. The declaration set forth in detail the essential exculpatory testimony that Harris would provide regarding matters as to which Harris was virtually the sole source of information. The motion was denied.

A jury trial commenced on January 5, 2004. The district court, over objection by Kotula, permitted admission against Kotula of Harris's deposition and trial testimony in the civil cases, despite the fact that Kotula had no opportunity to cross-examine Harris. The prior testimony was admitted against Kotula for its truth.[1]

Harris's prior testimony stated that Kotula was part of the "management team" at the Park and referred to "abusive tax shelter promoter" Douglas Carpa who Harris had utilized in forming trusts that were the subject of the indictment. *See United States v. Marsh*, 144 F.3d 1229 (9th Cir.), *cert. denied*, 525 U.S. 973 (1998) (Carpa convicted of tax conspiracy). The district court admitted the testimony against Kotula despite the government's admission that no one "other than Harris had a relationship with these trusts" App. 173, and the district court's finding that "there is no evidence to tie Kotula to these trusts." App. 174. Harris's testimony also referred to other Harris businesses that were the subject of the indictment. The district court found that Harris's civil deposition and trial testimony, although "testimonial" and admitted for its truth, was admissible as a co-conspirator statement, although the Sixth Circuit found that "[t]he district court's reasoning is not entirely clear on this issue." App. 138.

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[1] The Sixth Circuit found that "Kotula objected to admission of Harris's civil testimony at the time" App. 137, and that Kotula and Schwentker Harris argued that "its admission violated their Sixth Amendment Confrontation Clause rights . . . ." App. 136.

In regard to Count 1's tax conspiracy, the district court never defined "willfulness" for the jury nor instructed regarding the government's burden to negate Kotula's good faith. In fact, the district court found that the government had no such burden to negate Kotula's good faith. App. 8.

On February 3, 2004, all defendants were convicted on all counts. Kotula's timely filed motion for judgment of acquittal and new trial was denied. In a judgment entered August 2, 2004, Kotula was sentenced to 70 months imprisonment. App. 180. Kotula filed a timely notice of appeal.

On October 10, 2006, the U.S. Court of Appeals for the Sixth Circuit vacated Kotula's conviction on Count 5, finding that the district court erred by not instructing the jury on good faith on that count.[2] The Court affirmed the conviction on Count 1 and vacated the sentence pursuant to *Booker*. Kotula's requests for rehearing and rehearing en banc were denied.

The Court of Appeals observed that "Kotula plausibly shows how a jury could conclude that he was not knowingly involved in the conspiracy and did not know he was violating federal tax law . . . ." App. 147. Had Kotula been given either a separate trial in which Harris testified or

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[2] The conviction on Count 5, which the Sixth Circuit reversed, related to Kotula's sale of property to Ashtabula County in a tax deferred exchange pursuant to 26 U.S.C. §1033. The sale of the property was reported to the IRS by the title company and Kotula employed counsel to assist him in accomplishing the tax-deferred exchange. The sale to Ashtabula County was reviewed and approved by the County Prosecutor and Kotula was continuously in contact with IRS Agent Listermann who granted an extension of time for Kotula to purchase replacement property.

the opportunity to cross-examine Harris, or had the jury been instructed properly on good faith, Kotula may well have been acquitted.

REASONS FOR GRANTING THE PETITION

I. Review Should be Granted Because the Courts of Appeals Have Reached Conflicting Decisions Regarding the Applicability of the Confrontation Clause to Coconspirator Statements and Petitioner Kotula Was Convicted Based on Co-Defendant Harris's Prior Civil Deposition and Trial Testimony Which Was Admitted as Substantive Evidence Without the Opportunity for Cross-Examination in Violation of the Sixth Amendment.

Co-defendant Harris's prior civil trial and deposition testimony was admitted against Kotula for its truth even though the district court found that such evidence was "testimonial" and Harris was not available for cross-examination.[3] The trial culminated with this out-of-court testimony from the alleged ringleader of the conspiracy. The district court found, and the Court of Appeals affirmed, that the testimony was admissible because it consisted of coconspirator statements pursuant to Federal Rule of Evidence 801. Although recognizing that Kotula's claim was a constitutional one, App. 136, the Court of Appeals held *sub silentio* that compliance with the hearsay exception satisfied the Sixth Amendment.

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[3] The testimony was from *Asset Mgmt. v. Trustees of Conneaut Lake Park, Inc.*, No. 1999-746 (Pa.Cmwlth. 1999) and *Watson v. Trustees of Conneaut Lake Park, Inc.*, Equity Case No. 1998-8, 795 A.2d 1068 (Pa.Cmwlth.), *appeal denied*, 571 Pa. 712, 812 A.2d 1232 (2002).

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Confrontation Clause "'forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'" and "'permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.'" *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

This case presents a collision of the premises recognized in *Crawford v. Washington*, 541 U.S. 36 (2004) that, for Confrontation Clause purposes, prior testimony is almost always "testimonial" and co-conspirator statements are almost never "testimonial."

In *Crawford*, after a review of the history of the right of Confrontation, this Court held that the Constitution provided confrontation as a procedure that could not be avoided by application of the rules of evidence or a determination that the statement in issue was ostensibly reliable. Confrontation "is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69.

The Court in *Crawford* did not set forth a comprehensive definition of "testimonial," but held that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial." *Id.* at 68. "Testimonial"

statements include "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" *Id.* at 51-52. The Court cited several cases in which prior testimony was found inadmissible due to lack of cross-examination. *Id.* at 57. The Court found that prior testimony and plea allocations were "plainly testimonial statements" *id.* at 64, and noted that "[t]o add insult to injury, some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial." *Id.* at 65 (emphasis in original). "That inculpating statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the Clause's demands most urgent." *Id.* "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id.* at 62.[4]

The Court concluded that the Sixth Amendment demands "unavailability and a prior opportunity for cross-examination." *Id.* at 68. This conformed with the Court's prior holdings that "prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine." *Id.* at 57.

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[4] The principles set forth in *Crawford* were reiterated in *Davis v. Washington*, 126 S.Ct. 2266 (2006) in which the Court found that historically the Confrontation Clause had been applied to prior trial and deposition testimony. *Davis*, 126 S.Ct. at 2274-2275 and n. 3. "Most of the American cases applying the Confrontation Clause or its state constitutional or common-law counterparts involved testimonial statements of the most formal sort – sworn testimony in prior judicial proceedings or formal depositions under oath . . . ." *Id.* at 2275-2276.

The Court rejected any open-ended exceptions to the constitutional confrontation requirement. "[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Id.* at 53-54. "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." *Id.* at 51.

In reviewing historical sources, the Court found "scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case." *Id.* at 56 (emphasis in original). The Court noted that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records or statements in furtherance of a conspiracy." *Id.* However, the Court held that "[w]e do not infer from these that the Framers thought exceptions would apply even to prior testimony." *Id.*

The Court, in *Crawford*, characterized its earlier decision in *Bourjaily v. United States*, 483 U.S. 171 (1987) as having "admitted statements made ***unwittingly*** to a Federal Bureau of Investigation informant after applying a more general test that did not make prior cross-examination an indispensable requirement." *Id.* at 58 (footnote omitted) (emphasis added). The Court in *Bourjaily* applied *Ohio v. Roberts*, 448 U.S. 56 (1980), which *Crawford* overruled. The *Crawford* Court's characterization of the statements in *Bourjaily* as made "unwittingly" suggests that the

statements were not "testimonial" and that, therefore, no cross-examination was required.[5]

This conclusion is reinforced by *Davis v. Washington*, 126 S.Ct. 2266, in which the Court cited *Bourjaily* and noted that "[w]here our cases did dispense with those requirements [unavailability and prior cross-examination] – even under the *Roberts* approach – the statements at issue were clearly nontestimonial. *See, e.g., Bourjaily v. United States*, 483 U.S. 171, 181-184 (1987) (statements made unwittingly to a Government informant)." *Davis*, 126 S.Ct. at 2275. The Court in *Davis* also cited *Dutton v. Evans*, 400 U.S. 74 (1970), in which the Court had "emphasized that the co-conspirator spontaneously made the statement and 'had no apparent reason to lie.'" *Lilly v. Virginia*, 527 U.S. 116, 132 n. 2 (1999). *See Davis*, 126 S.Ct. at 2275.

For several reasons, coconspirator statements in prior deposition and trial testimony should be subject to the Confrontation Clause and should not be admitted except where the declarant is unavailable and the prior testimony was subject to cross-examination by the defendant.

First, prior deposition and trial testimony are the types of statements that are testimonial "under any definition." *Crawford*, 541 U.S. at 52.

Second, the Court has been reluctant to adopt a blanket rule permitting hearsay exceptions to substitute for confrontation. For example, Justice Breyer has raised the

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[5] In *Bourjaily* the Court found that the Confrontation Clause was satisfied because "the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence . . . ." 483 U.S. at 183. The Court agreed with the Court of Appeals that "the requirements for admission under Rule 801(d)(2)(E) are identical to the requirements of the Confrontation Clause . . . ." *Id.* at 182.

question of whether the Confrontation Clause would be satisfied by an uncross-examined statement rendered admissible "simply because of a fortuity, such as the conspiracy having continued through the time of police questioning, thereby bringing the confession within the 'well-established' exception for the vicarious admissions of a co-conspirator?" *Lily*, 527 U.S. at 141 (Breyer, J. concurring). Requiring cross-examination in regard to all "testimonial" statements, even those that otherwise meet the requirements of a hearsay exception, will avoid such fortuitous results.

Third, even under prior Confrontation standards, the Court has been disinclined to admit the uncross-examined statement of a co-defendant. *See Lee v. Illinois*, 476 U.S. 530, 541 (1986) (confession of an accomplice is presumptively unreliable); *Douglas v. Alabama*, 380 U.S. 415, 419 (1965).

Fourth, when in-court testimony is involved, live cross-examined testimony is preferred to admission of prior testimony. In *United States v. Inadi*, 475 U.S. 387, 393-394 (1986), the Court noted the preference for live in-court testimony as opposed to prior testimony. "[F]ormer testimony often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony. If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence." *Id.* at 394. This is contrary to the typical case

involving coconspirator statements in which the prior, often recorded, statement is better evidence than repeating the recorded statement in court. Typically, coconspirator statements cannot be replicated if made the subject of in-court testimony because they provide "evidence of the conspiracy's context." Id. at 396. Accordingly, in regard to deposition or trial testimony, the Confrontation Clause requires live cross-examined testimony.

Fifth, "testimonial" statements, unlike many coconspirator statements, are not made either "unwittingly" or "spontaneously" as are coconspirator statements that have previously been admitted without cross-examination.

The Sixth Circuit's decision in this case is contrary to decisions of several other federal courts.

In *United States v. W.R. Grace*, 455 F.Supp.2d 1199 (D. Mont. 2006), the district court denied admission in a criminal case of prior deposition testimony and sworn statements in civil trials on the ground that these were "testimonial" statements subject to the Confrontation Clause. The case alleged a conspiracy to conceal contamination caused by Grace's mining operation. As in this case, the government contended that the prior depositions and civil trial testimony were part of the conspiracy. The court held that the prior testimony fell within the core definition of "testimonial" for Confrontation Clause purposes and could not be converted into co-conspirator statements admissible without confrontation. The court noted that "[c]o-conspirator statements are ordinarily matters like casual comments or conversation that takes place outside of the formality of an oath of a reporter, and of anticipation that it will be used in litigation. . . . Here the government seeks to turn sworn testimony into statements in furtherance of a conspiracy so

that it can do what the Constitution prohibits: call a defendant as a witness to testify when he or she is not subject to cross-examination." *Id.* at 1202-1203.

Similarly, in *United States v. Saner*, 313 F.Supp.2d 896 (S.D. Ind. 2004), the court excluded, on Confrontation Clause grounds, the use, in an antitrust conspiracy case, of testimonial statements made by a competitor to a Justice Department attorney tending to show the existence of a conspiracy. The court held that the only indicator of reliability sufficient to allow introduction of statements was cross-examination, which had not taken place.

In *Crawford*, the Court cited coconspirator statements as a category of hearsay that might be excepted from the requirement of confrontation because such statements "by their nature were not testimonial." *Crawford*, 541 U.S. at 56. Several courts have applied this observation, as in this case, as a green light to admit all coconspirator statements without regard to the Confrontation Clause.

In *United States v. Lopez-Medina*, 461 F.3d 724 (6th Cir. 2006), the Sixth Circuit upheld admission of drug ledgers to prove the matters asserted, concluding that "[s]uch co-conspirator statements are considered nontestimonial and their admissibility is not affected by the Supreme Court's decision in *Crawford* . . ." *Id.* at 746 n. 5. *See also United States v. Jones*, 2007 WL 1046515 (7th Cir. 2007) ("Statements made to coconspirators in furtherance of the conspiracy are not testimonial hearsay – or hearsay at all – and their admission therefore does not raise concerns under the Confrontation Clause."); *United States v. Franco-Beltran*, 2007 WL 1219230 (9th Cir. 2007) ("Under the *Roberts* framework, the admission of co-conspirator statements under Rule 801(d)(2)(E) does not violate the Confrontation Clause," citing *Bourjaily*); *United States v.*

Carson, 455 F.3d 336, 365 (D.C. Cir. 2006), *cert. denied*, 127 S.Ct. 1351 (2007) ("Statements satisfying the coconspirator non-hearsay rule under Federal Rule of Evidence 801(d)(2)(E) may be admitted against co-defendants without violating the Confrontation Clause.").[6]

In *United States v. Sullivan*, 455 F.3d 248 (4th Cir. 2006), the Fourth Circuit held that a coconspirator's statements in furtherance of the conspiracy were nontestimonial where they consisted largely of "observations about the involvement of various other members of the conspiracy in the sale of drugs, such as repeating that other conspirators told the witness that they had purchased drugs from Campbell." *Id.* at 258.[7]

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[6] The Court in *Carson* held that "*Crawford* does not undermine *Bourjaily*. Coconspirator statements in furtherance of a conspiracy are not typically the type that fall within the definition of 'testimonial.' The *Crawford* Court recognized as much." *Id.* at 365 n. 25.

[7] In *United States v. Holmes*, 406 F.3d 337 (5th Cir.), *cert. denied*, 126 S.Ct. 375 (2005), a case involving a conspiracy between an attorney and a clerk of courts relating to the back-dating of a filing, the district court admitted the civil deposition testimony of the attorney's coconspirator. The court noted that the "the challenged evidence here, however, is not the run-of-the-mill co-conspirator's statement made unwittingly to a confidential government informant, or made casually to a partner-in-crime; rather, we have a co-conspirator's statement that is derived from a formalized testimonial source-recorded and sworn civil deposition testimony." Id. at 348-349. The Fifth Circuit declined to decide whether the deposition testimony was testimonial or not, finding instead that the testimony was offered "both to show the existence of a scheme and to prove one of the overt acts charged in the indictment." *Id.* at 349. "[T]his nonhearsay use of her testimony poses no Confrontation Clause concerns." *Id.* at 349.

Kotula's right to Confrontation was violated because Harris was unavailable (as a result of the district court's denial of Kotula's motion for severance) and Kotula had no opportunity to cross-examine Harris.

Harris's testimony was prejudicial to Kotula because it fingered Kotula as the "administrative assistant" for "[a] number of companies that I [Harris] was involved in" and as part of the "management team" at Conneaut Lake Park, which the government contended was a significant source of unreported income. Being named by the conspiracy's ringleader as a member of the "management team" in a company used to further the goals of a tax conspiracy at the culmination of a lengthy tax conspiracy trial is very prejudicial.

The Sixth Circuit recognized the importance of Harris's testimony. "Harris admitted that he had not signed a federal income-tax return since 1981, and that he created the non-profit Trustees and transferred the park grounds to them in August 1997 because he was concerned that the government might seize the property to satisfy his delinquent tax obligations." App. 143. From this uncross-examined evidence, the Court of Appeals concluded that the evidence "supports the inference that Kotula was aware of the tax-evading purpose animating Harris's transfer of the park to the Trustees." App. 154.

Kotula had absolutely no involvement with many of the entities in which Harris was involved, but did not have the opportunity to elicit this fact on cross-examination. For example, Kotula had no knowledge of or involvement with Harris's offshore accounts, trusts, and other vehicles. App. 173-176. Nevertheless, this uncross-examined testimony permitted the jury to infer that Kotula assisted Harris in regard to these entities.

The prior deposition and trial testimony admitted at trial in this case was "testimonial." Harris's statements were not made unwittingly nor were they spontaneous, but were made when he very much had his wits about him. The deposition was taken before a court reporter under oath. The trial testimony was on the stand, under oath, in a courtroom. Both were admitted as substantive evidence of the guilt of all three defendants despite the fact that Kotula had no opportunity to cross-examine Harris.

Since Kotula could not cross-examine Harris, admission of the prior testimony violated the Confrontation Clause. Accordingly, this Court should grant the petition and hear this case because the courts of appeals have reached conflicting conclusions regarding the application of the Confrontation Clause to coconspirator statements, contrary to the recent decisions of this Court.[8]

II. Review Should be Granted Because the Denial of Severance Conflicts With the Decisions of Other Courts of Appeals Requiring Severance Where, As in This Case, Co-Defendant Harris, by Declaration Under Penalty of Perjury, Waived His Fifth Amendment Privilege Against Self-Incrimination and Set Forth the Essential Exculpatory Testimony That He Would Provide in A Separate Trial.

[8] The testimony at issue was requested by the government and objected to by Kotula on the ground that it deprived him of the right of cross-examination. App. 137. Neither the district court nor the prosecutor ever suggested that Harris's testimony was not admitted for its truth, and no instruction was given that the jury should not consider the testimony for its truth.

The district court, affirmed by the Court of Appeals,[9] denied severance despite the fact that co-defendant Harris provided a declaration under penalty of perjury that he would waive his Fifth Amendment privilege and testify at a separate trial of Kotula. Harris's declaration detailed the exculpatory information that he would provide. Harris's testimony was essential because there were few, if any, people with knowledge of matters relating to Kotula's employment by Harris. If this case does not require severance based on the availability of co-defendant testimony, then none would.

In *Zafiro v. United States*, 506 U.S. 534, 539 (1993), this Court held that Federal Rule of Criminal Procedure 14 permits severance when a defendant "is prejudiced by joinder" and that "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539. The Court observed that such a risk might arise "if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. *See, e.g., Tifford v. Wainwright*, 588 F.2d 954 (5th Cir. 1979)." *Id.*

In *Tifford v. Wainwright*, the district court, affirmed by the court of appeals, granted habeas relief where the defendant set out the specific exculpatory evidence that required severance. Tifford was an attorney who had been charged in a few counts of an indictment in which his

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[9] The Court of Appeals failed to distinguish between Schwentker Harris's argument for severance and Kotula's argument for severance. Kotula asserted that the essential exculpatory evidence provided by Harris required severance, while Schwentker Harris argued that severance was required due to spillover of prejudicial evidence.

client, Bronstein, had been indicted for offenses arising from a scheme to cash forged checks. "Tifford also filed an affidavit signed by Bronstein stating that Bronstein would, if the motion to sever were granted, testify in Tifford's trial to the fact that Tifford never knew of his nefarious activities." *Id.* at 957.

> The affidavits set out specific exculpatory testimony that would be available only if the motion to sever were granted. The prejudice arising from the denial of the motion was also conclusively established; the issue of Tifford's knowledge of his co-defendants' criminal activities was central to the crimes charged by the indictment, and the co-defendants' testimony was essential to rebut the prosecution's proof on this crucial issue. The affidavits showed that the possibility of the co-defendants testifying was "more than a gleam of possibility in the defendant's eye," . . . and that the prejudice resulting from the denial of the motion to sever was not speculative.

Id. at 957 (citation omitted). The court held that failure to grant severance rendered the trial fundamentally unfair.

The Eleventh Circuit has likewise concluded that "a motion to sever based on the need for exculpatory testimony of a co-defendant implicates the constitutional rights of the movant." *United States v. DiBernardo*, 880 F.2d 1216, 1219, 1226 (11th Cir. 1989). In *DiBernardo*, severance was upheld where "D'Apice confirmed [under oath] that he would supply exculpatory testimony in a trial of Rothstein and DiBernardo alone, but that if tried with the other two defendants, he would invoke his fifth amendment privilege." As in this case, "the proposed testimony strongly indicated that D'Apice was the only person involved in certain aspects of the activities charged as

criminal." *Id.* at 1228. "The affidavits submitted with the 1981 motion and D'Apice's sworn statements at the pre-trial hearing demonstrated the substance of his testimony, its exculpatory nature and effect, and his willingness to testify." *Id.*

It is prejudicial for one standard for severance based on co-defendant testimony to apply in one Circuit and a different standard to apply in the Sixth Circuit. Kotula was denied a fair trial because he was deprived of the opportunity to present Harris as a witness. Kotula met the standard set forth in *Tifford* as referenced in this Court's decision in *Zafiro*. Kotula provided the district court with a declaration from Harris which established that Harris was available, would testify at a separate trial, waived his Fifth Amendment privilege, and was the only witness with information regarding most matters alleged against Kotula. Harris's declaration established that Kotula:

a. Had no decision-making authority in regard to the finances of any Harris entity;

b. Held no ownership interest in any business with Harris;

c. Acted strictly pursuant to orders and directions from Harris;

d. Had no involvement in the criminal conduct which gave rise to Harris's prior federal convictions;

e. Paid attorneys only at Harris's direction;

f. Had no responsibility to prepare or file tax returns for any Harris entity;

g. Had no knowledge or involvement in the creation of the offshore accounts referenced in the indictment;

h. Had no involvement with the creation of any trusts affiliated with Harris; and

i. Was not an officer of any of Harris's affiliated companies nor was he involved in their creation.

App. 168-171.

Harris's testimony was plainly exculpatory and would have negated the wholly circumstantial evidence against Kotula. App. 48. Further, many of the matters about which Harris would have testified were matters regarding which there were few, if any, persons with knowledge. Harris was not a peripheral witness. His testimony went to the heart of the case.

Kotula expects the government to contend, as it did in the lower courts, that severance was not required because Harris is a liar who would not have been believed by the jury and that Harris's testimony would not have precluded Kotula's conviction as a matter of law. However, this should not be the standard and issues of credibility should be reserved for the jury. In *DiBernardo*, the government opposed the motion to sever "based on the contention that D'Apice will commit perjury." 880 F.2d at 1229. The Eleventh Circuit rejected this assertion and held that "judicial economy must yield to a defendant's right to a fair trial." *Id.* at 1228.

This Court should grant the petition to resolve the conflict among the decisions of the courts of appeals.[10]

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[10] The district court concluded that Harris was "not credible"

III. Review Should be Granted Because the District Court Never Defined for the Jury the "Willfulness" Required for Conviction of Tax Conspiracy, Including the Government's Burden to Negate Kotula's Good Faith.

The jury was never instructed on the definition of "willfulness" in regard to Count 1, nor was the jury instructed that the government bore the burden to negate Kotula's good faith.[11] Kotula submitted an instruction covering both issues.[12] Despite this Court's holding that

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because Harris had represented himself and filed several pro se motions that the district court found to be frivolous. App. 34-36. However, the district court erred in denying severance by imputing Harris's conduct to Kotula.

[11] "Willfulness" is an element of the offense. The Court of Appeals found that to establish a conspiracy it must find that "the defendant willfully became a member of the conspiracy." App. 148.

[12] All defendants objected to the district court's failure to instruct on good faith and Kotula proposed the following instruction to define "willfulness" in regard to the Count 1 conspiracy.

> In order to sustain its burden of proof for the crime of conspiracy, the government must prove beyond a reasonable doubt that defendant acted "willfully".
>
> To act willfully means to act voluntarily and deliberately and intending to violate a known legal duty.
>
> If the defendant acted in good faith, that is to say he actually believed the actions he took were allowable by law, then he is not guilty of conspiracy. It does not matter whether the defendant was right or wrong in his belief, nor does it matter if his belief makes sense or sounds reasonable to you. The only thing that matters is

the government's burden "requires negating a defendant's claim . . . that he had a good faith belief," *Cheek v. United States*, 498 U.S. 192, 202 (1991), the district court denied the good faith instruction on the ground that "it was also not the government's burden to prove beyond a reasonable doubt that this [good faith] defense did not apply to this case." App. 8. The Sixth Circuit's decision essentially renders *Cheek* a dead letter. If a good faith instruction is not required in this case, then a good faith instruction would not be required in any case.

In *Cheek*, this Court reaffirmed that a finding of "willfulness" is required and that a consideration of the defendant's good faith is part of that inquiry. A good faith instruction is particularly significant in a complex tax case. "'Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct.'" *Cheek*, 498 U.S. at 200, citing *United States v. Murdock*, 290 U.S. 389, 396 (1933).

> whether or not the defendant actually believed he was correct in his actions.
>
> Also, it is not the defendant's burden to prove that he did believe his actions were correct, but rather it is the government's burden to prove that he did not. It is for you, the jury, to decide whether the government has proven that the defendant knowingly and willfully attempted to violate the law as the indictment alleges by proving beyond a reasonable doubt that he did not actually believe his actions were correct.

App. 189-190.

The Court recognized that Congress had made "specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term 'willfully' as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws." *Id.* at 200-201.[13]

The Court in *Cheek* placed the burden on the government to negate the defendant's good faith. The government's "burden [to prove willfulness] requires negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws. This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist." *Id.* at 202. A defendant cannot be aware of a legal duty "if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable." *Id.*

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[13] "Willfulness" is required because the tax statutes are "highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct." *Bryan v. United States*, 524 U.S. 184, 194 (1998). "Tax law involves a unique scheme consisting of myriad categories and thresholds, applied in yearly segments, designed to generate appropriate levels of taxation while also influencing behavior in various ways. Innocent 'avoidance' is an established part of this scheme, and it does not operate to undermine the purposes of the tax law." *Ratzlaf v. United States*, 510 U.S. 135, 157 n. 8 (1994) (Blackmun, J., concurring).

The failure to give an instruction including the government's burden to negate the defendant's good faith leaves the jury with evidence relating to the defendant's good faith, but no road map regarding how that evidence should be considered in the context of the charges. Failing to instruct the jury how to assess good faith evidence is akin to forbidding the jury to consider such evidence, and "forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." *Id.* at 203.

The Sixth Circuit's decision conflicts with cases from other circuits regarding whether a good faith instruction setting forth the government's burden is required in a tax case. In *United States v. Morris*, 20 F.3d 1111, 1118 (11th Cir. 1994), in which the defendants were indicted for both conspiracy and filing a false tax return, the Eleventh Circuit reversed a conviction due to the failure to give a good faith instruction, finding that the court's instruction "does not make clear that a good-faith belief by the appellants that they were complying with the tax laws, whether or not objectively reasonable, negates the specific intent element of the crime." The Eleventh Circuit found that:

> *Cheek* instructs that the government must carry the burden of proving that appellants knew of the duty imposed by the law, "[b]ut, carrying this burden requires negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good faith belief that he was not violating any of the provisions of the tax laws."

Id. at 1115. The court found that the instructions defining "knowingly" and "voluntariness" were insufficient to convey that "willfulness" is negated by good faith.

Other courts of appeals have likewise required a good faith instruction. *See United States v. Hauert*, 40 F.3d 197, 202 (7th Cir. 1994), *cert. denied*, 514 U.S. 1095 (1995) (jury was instructed that "[i]f the defendant, in good faith, believed that the tax laws did not require that he file individual tax returns for a particular year, then any failure to file any income tax return for that year cannot be found to be willful, even if such belief were incorrect."); *United States v. Gianandrea*, 38 Fed.Appx. 434, 436, 2002 WL 464558 (9th Cir. 2002) (conviction for bankruptcy fraud reversed where jury was instructed on the good faith defense but was not instructed that the prosecution was required to disprove good faith); *United States v. Lindsay*, 184 F.3d 1138, 1140-1141 (10th Cir.), *cert. denied*, 528 U.S. 981 (1999) (jury instructed that "'good faith,' which 'means, among other things, an honest belief, a lack of malice, and the intent to perform all lawful obligations,' is a defense to conduct otherwise punishable under the tax laws"); *United States v. Willis*, 277 F.3d 1026, 1032 (8th Cir. 2002) (jury instructed that a "defendant's good faith is recognized as a defense to the charge of tax evasion, because good faith on the part of a defendant is simply inconsistent with the willful intent to violate the law with which he's charged."). *But see United States v. Bidegary*, 39 Fed.Appx. 506, 508, 2002 WL 530545 (9th Cir. 2002), *cert. denied*, 537 U.S. 1171 (2003) ("A separate instruction on good faith is unnecessary where the trial court has adequately instructed the jury on specific intent.").[14]

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[14] *United States v. Pomponio*, 429 U.S. 10 (1976) is often cited by courts of appeals which decline to instruct on the defendant's good faith. However, in *Pomponio*, although the Court rejected defendant's request for a good faith instruction, the defendant's good faith was embodied in the trial court's instruction regarding the specifics of the transactions, *i.e.*, the jury was instructed to determine whether certain transactions were "bona fide loans," and, therefore, made in good faith. *Id.* at 13 n. 4.

The district court never defined "willfulness" in regard to Count 1. Instead, the district court instructed the jury that "[i]f you are convinced that there was a criminal agreement, then you must decide whether the government has proved that the defendants knowingly and voluntarily joined that agreement." App. 177. The district court instructed that "the government must prove that he or she knew the conspiracy's main purpose, and that he or she voluntarily joined it intending to help advance or achieve its goals." App. 177. "A slight role or connection may be enough" and "[a] defendant's knowledge can be proved indirectly by facts and circumstances which lead to a conclusion that he or she knew the conspiracy's main purpose." App. 178. These instructions do not include any element of "willfulness."

This Court has explicitly held that mere knowing and intentional conduct is insufficient to satisfy the "willfulness" standard. "[I]n view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in a payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree." *United States v. Bishop*, 412 U.S. 346, 352 (1973). "The Court's consistent interpretation of the word 'willfully' to require an element of mens rea implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers." *Id.* at 361.

Since the district court never defined "willfulness" in regard to Count 1, petitioner Kotula was convicted based only on a finding that he acted knowingly and voluntarily. This is contrary to case law in all other Circuits as well as the statute and this Court's decision in *Cheek*.

The Sixth Circuit excused the district court's failure to instruct the jury on "willfulness" in regard to Count 1 by finding that the jury could have bootstrapped the definition of "willfulness" from the tax evasion instructions on Counts 2 through 5 into the Count 1 tax conspiracy instructions. The district court, when delivering the instruction on "willfulness," expressly excluded Count 1 and limited its instruction on "willfulness" to the offenses of attempted tax evasion in Counts 2 through 5 and provided no instruction on good faith.[15]

The inference that the jury applied the tax evasion jury instruction to the tax conspiracy charge is unreasonable. In order to infer that the jury applied the tax evasion willfulness instruction to Count 1, the tax conspiracy count, one must presume that the jury disobeyed three of the district court's admonitions, *i.e.*, the counts to which the instruction applied, the description of the offenses to which the instruction applied, and the defendants to whom the instruction applied. This is contrary to the required presumption that the jury followed its instructions and did

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[15] In regard to tax evasion Counts 2-5, the district court instructed:

> In order to sustain its burden of proof for the crimes of attempted income tax evasion as charged in Counts 1, 2 -- I'm sorry, ***Counts 2, 3, 4 and 5*** of the indictment, the government must prove beyond a reasonable doubt that Defendant Gary Harris and/or Defendant Michael Kotula acted "willfully."
>
> To act willfully means to act voluntarily and deliberately and intending to violate a known legal duty. Negligent conduct is not sufficient to constitute willfulness.

App. 179 (emphasis added).

not find "willfulness" in regard to Count 1 since no definition of "willfulness" was ever provided. *See Richardson v. Marsh*, 481 U.S. 200, 208 (1987).

The district court's failure to define "willfulness" and instruct on good faith is highlighted by the Sixth Circuit's decision to vacate Kotula's conviction on Count 5 because the district court should have instructed on good faith. The Court of Appeals held that

> The district court should have instructed the jury that the issue is whether Kotula *had a good faith belief* that there were reasonable grounds to fear that the county would exercise eminent domain. This may sound cumbersome, but it is the only way to capture both the Supreme Court's definition of tax-law willfulness and the Revenue Rulings' reasonable-grounds standard for §1033 deferral.
>
> Even assuming that there was strong evidence that Kotula did *not* have a good-faith belief that there were reasonable grounds to fear eminent domain, the jury did not know that was the question at hand.

App. 161-162 (emphasis in original) (footnotes omitted). If the jury did not know that this was the question at hand in regard to Count 5, then the jury did not know that Kotula's good faith was the question at hand in regard to Count 1.

The Sixth Circuit held that an instruction requested by a defendant is only required if it is a correct statement of law, the instructions given did not cover the element requested, and the defendant's defense was impaired by failing to give the instruction. App. 91. *First*, no one disputed that the instruction requested by Kotula was a correct statement of law.

Second, the tax evasion instruction on willfulness did not cover the required element of willfulness or the prosecutor's burden to negate good faith in regard to Count 1. Even if the tax evasion instruction on willfulness could be construed as applicable to Count 1, the instruction was insufficient because it made not reference to the government's burden to negate Kotula's good faith. By failing to instruct on good faith, the district court essentially withdrew the issue from the jury based on the district court's belief that Kotula, rather than the prosecutor, had the burden of proof on good faith. "Knowledge and belief are characteristically questions for the factfinder, in this case the jury." *Cheek*, 498 U.S. at 202. Although this Court in *Cheek* held that the prosecutor had the burden to "negate" Kotula's assertion of good faith, the district court held that it was "not the government's burden to prove beyond a reasonable doubt that this defense did not apply to this case." App. 8.

Third, if the cursory willfulness instruction given in regard to Counts 2 through 5 were construed to always implicitly subsume the issue of good faith, then a good-faith instruction would never be required and *Cheek* would be a dead letter. *Finally*, the failure to give a willfulness instruction addressing good faith on Count 1 substantially impaired Kotula's defense as demonstrated by the Sixth Circuit's decision that a good faith instruction should have been given on Count 5.

The evidence established Kotula's good faith reliance on accountants, attorneys, and Harris's plea agreement as resolving Harris's tax issues. The Court of Appeals found that "the jury might also conclude that all of Harris's and Kotula's non-filings and nonpayments, both within and outside the conspiracy period, were caused by a sincere belief that they were not required to file returns and pay

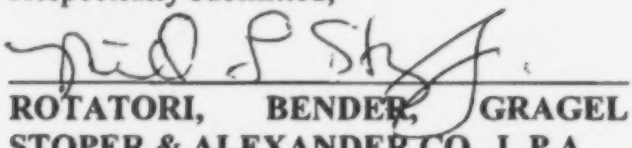
taxes, or that they had already done all that was required." App. 131. However, the jury could not reach this conclusion since the jury was not instructed that such a sincere good faith belief was a defense to the indictment.

The Sixth Circuit's decision conflicts with this Court's decision in *Cheek* and decisions of the courts of appeals regarding the instructions on willfulness and good faith. Accordingly, this case should be reviewed by this Court to resolve the conflict with the decisions of the courts of appeals and this Court's decision in *Cheek*.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be granted.

Respectfully submitted,



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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,	) CASE NO.: 1:03CR00264
Plaintiff,	) JUDGE JOHN ADAMS
v.	
GARY HARRIS, et al.,	) ORDER AND DECISION
Defendants.	)

This matter comes before the Court on motion by Defendant, Michael J. Kotula (hereinafter referred to as Defendant), for judgment of acquittal or in the alternative for a new trial. (Doc. #294) The United States of America (hereinafter referred to as the Government) filed a response to the motion. A reply was filed thereafter. The Court has been advised having reviewed the motion, opposition thereto, reply, exhibits, transcripts and applicable law. For the reasons stated below, it is hereby determined that Defendant's motion is DENIED.

It is noted that Defendant reargues many issues that were raised in motions during pretrial or trial and previously ruled on by this Court. Those issues will not be further addressed as the Court stands by its prior rulings. Defendant is advised that a motion for a judgment of acquittal or new trial is not a substitute for an appeal.

DISCUSSION

Defendant has filed a motion for judgment of acquittal or in the alternative a new trial. The relevant question on a motion for a judgement of acquittal is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Landham*, 251 F.3d 1072, 1083 (6th Cir. 2001) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Additionally, a district court should only grant a motion for a new trial "in extraordinary circumstances where the evidence weighs heavily against the verdict." *United States v. Robinson*, No. 02-6109 (6th Cir. May 19, 2004). The granting or denial of a motion for a new trial is "purely within the discretion of the trial court," *LaPerriere v. International Union United Auto., Aerospace and Agr. Implement Workers*, 348 F.3d 127, 132-33 (6th Cir. 2003), and is proper when "there is a reasonable possibility that [inadmissible] evidence might have contributed to a conviction." *United States v. DeSantis*, 134 F.3d 760, 769 (6th Cir. 1998). However, "[t]he verdict of a jury must be sustained if there was substantial evidence to support it." *United States v. Santos*, 20 F.3d 280, 283 (7th Cir. 1994).

I. JURY INSTRUCTIONS

When determining whether a new trial should be granted based on the failure to give a requested jury instruction, a court must determine "whether the charge, taken as a whole, fairly and adequately submits the issues and applicable law to the jury." *United States v. Martin*, 740 F.2d 1352, 1361 (6th Cir. 1984). An isolated instruction may be impermissible on its own, but found proper "if it takes on a permissible meaning in the context of surrounding instructions." *California v. Brown*, 479 U.S. 538, 541 (1987). The Court must look to whether: "(1) the requested

instruction is a correct statement of the law; (2) the requested instruction is not substantially covered by other instructions actually delivered; and (3) the failure to give the requested instruction impairs the defendant's theory of the case." *Id.* (citing *United States v. Chesney*, 86 F.3d 564, 573 (6th Cir. 1996)). The question is "what a reasonable juror could have understood the charge as meaning." *Brown*, 479 U.S. at 541; *United States v. Buckley*, 934 F.2d 84, 87 (6th Cir. 1991). Generally, a defendant is entitled to receive an instruction on his theory of the defense if it is supported by law and raised by the evidence presented at trial. *United States v. Tarwater*, 308 F.3d 494, 510 (6th Cir. 2002).

Jury instructions must be reviewed in their entirety to determine whether, when examined in the light of the whole record, they fairly, adequately, and correctly state the governing law to provide the jury with "an ample understanding of the applicable principles of law and factual issues confronting them." *United States v. Denny*, 939 F.2d 1449, 1454-55 (10th Cir. 1991). A court will grant a new trial based on an error in jury instructions only when the error is "prejudicial in light of the entire record." *Id.*

A. GOOD FAITH

Defendant's first argument is that he was prejudiced by the Court's failure to charge the jury on the "good faith" defense as he had requested. Defendant claims that such refusal deprived him of his right to present this defense to the jury. This theory is based on the claim that Defendant lacked the requisite intent, "willfully," because he relied in good faith on I.R.S. Code § 1033[1] for involuntary conversions.[2]

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[1] Throughout this proceeding, Defendant has used the term "like kind exchange" interchangeably with § 1033. However, a like kind exchange is found in §1031, which states:

The Government counters this argument by stating that Defendant presented no evidence at trial to warrant such an instruction. It is noted that Defendant's argument is pertinent only to Count V.

To support his argument, Defendant points to the following evidence presented at trial: (1) Defendant maintained continuing correspondence with IRS Agent Listermann regarding the status of his claimed §1033 involuntary conversion; (2) Agent Fisher testified at trial that if the requirements of §1033 were met the income from his real property sale would not have to be reported in 1998; (3) no one testified that the transaction did not qualify as a involuntary conversion under §1033; (4) Defendant had always filed taxes in the past; (5) Defendant sought legal

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26 U.S.C.A. §1031. Exchange of property held for productive use or investment.

(a) Nonrecognition of gain or loss from exchanges solely in kind.

(1) In general. - No gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind which is to be held either for productive use in a trade or business or for investment.

It is further noted that §1031 and §1033 differ in the timelines allotted to report the income. Under §1031, the property must be identified and the exchange completed within 180 days of the sale. Under §1033, the property must be replaced with similar or related property within 2 years from the close of the first taxable year that the gain was made.

[2] 26 U.S.C.A. §1033 - Involuntary Conversions states:

(a) General Rule - If property (as a result of its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof) is compulsorily or involuntarily converted - (1) Conversion into similar property - Into property similar or related in service or use to the property so converted, no gain shall be recognized.

counsel regarding the sale and §1033; (6) the sales agreement with Ashtabula County was demonstrative that the property was sold under threat of eminent domain; (7) Defendant's ongoing consultation with Title Company representatives and legal counsel regarding the transaction with Ashtabula County; and (8) Defendant's receipt of a §1099 document from the Title Company.[3] The Court will address each of these facts below.

Although Defendant did correspond with Agent Listermann, he did not do so until after he was told by his attorney that he was under investigation. Transcript at p. 2172. In addition, Defendant did not contact Agent Listermann until years after the sale of the property was completed and months after the time to replace the property under §1033 had expired.[4] Therefore, the fact that Defendant corresponded with Agent Listermann is not demonstrative that the property qualified as an involuntary conversion or that he relied on a good faith belief of such.

Even though there was no evidence that the real estate transaction did not qualify as a involuntary conversion, there was no evidence that Defendant did qualify for such. Therefore, although Agent Fisher testified that if the requirements of §1033 were met the income would not have

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[3] Defendant points only to the first six listed facts in his motion. The additional facts stated above were given in the reply brief.

[4] The sales agreement was entered into in January of 1998. The Settlement Statement was signed in March of 1998. The replacement period began on December 31, 1998 and ended in September 30, 2001. The letters from Agent Listermann all occurred in 2002-2003, which was more than the allotted two years for involuntary conversions under §1033. It is noted that Defendant was later granted a late extension to report the income, after his time to do so had terminated.

to be reported in 1998, this is not demonstrative of the Defendant's good faith that the sale of the property at issue did actually qualify for tax free status or that he relied in good faith of such.

It was not disputed that Defendant had always filed tax returns in the past. However, the mere fact that he had always filed returns is not demonstrative that he did not commit tax evasion for the year charged. Nor is it evidence that Defendant relied in good faith that he did not have to file taxes on the income received from the sale to Ashtabula County in 1998.

Defendant argued at trial that he had sought legal counsel regarding the sale of the property and §1033. The testimony at trial was that Defendant sought to speak to an attorney who was knowledgeable about §1033 exchanges and did consequently speak to such an attorney. However, there was no evidence presented regarding what was spoken about. Therefore, the fact that he sought out an attorney knowledgeable on this subject and later spoke to him does not demonstrate that Defendant relied on the good faith belief that the transaction qualified as a involuntary conversion under §1033.

The sales agreement does not state that the property was sold under threat of eminent domain but merely states that Defendant Kotula recognized the County's right to do so. "Seller recognizes the Buyers right to commence proceedings under its eminent domain powers under the State of Ohio in order to acquire title to the property unless an agreement of sale is entered into by the parties." (emphasis added). The agreement *does* state, "[i]t is hereby acknowledged by the Buyer that the Seller intends to have the sale of this property qualified under the Internal Revenue Service Code as a like kind exchange. It is the Sellers intent

to enter a future purchase of a like kind property and it will be the Sellers responsibility to file the appropriate forms and notifications as required under the I.R.S. code." See id., §5.09.

It is first noted that §1031 covers "like kind exchanges." Therefore, this section of the agreement cannot be determined to evidence only that Defendant intended to the sale to qualify for tax free status under §1033. Additionally, this second section is not demonstrative that Defendant failed to file taxes on the income received from the real property sale in 1998 based on his good faith that the transaction would qualify under §1033. Defendant did not even seek to have the income qualified under a §1033 involuntary conversion until after the time to do so had expired.

Finally, Defendant refers to his communications with the Title Company and the 1099 he received from it as proof of his good faith reliance that the sale qualified for tax free status under §1033. The Court is at a loss to understand how this evidence is demonstrative of Defendant's good faith belief that the transaction qualified as a involuntary conversion under §1033.

Based on the above, this Court agrees with the Government that no evidence was presented at trial which warranted an instruction on the good faith defense. However, even if the Court were to assume that the evidence was sufficient to warrant such an instruction, viewing the instructions as a whole, it is determined that they adequately encompassed Defendant's theory of defense. This Court instructed the jury as to the definition of "willfully," stating, "[i]n order to sustain its burden of proof for the crimes of Attempted Income Tax Evasion as charged in Counts II, III, IV and V of the indictment, the government must prove

beyond a reasonable doubt that Defendant Gary Harris and/or Defendant Michael Kotula acted 'willfully'." The instructions gave the following definition of "willfully" as: "[t]o act willfully means to act voluntarily and deliberately and intending to violate a known legal duty. Negligent conduct is not sufficient to constitute willfulness." A finding that Defendant acted willfully would necessarily negate any possibility of good faith in filing false tax returns. *See United States v. Pomponio*, 429 U.S. 10, 12-13 (1976) (finding that an additional instruction on good faith is unnecessary if the district court instructs the jury on the term "willfully" as used in §7206 as "a voluntary, intentional violation of a known legal duty".); *See also United States v. Ervasti*, 201 F .3d 1029, 1041 (8th Cir. 2000). Therefore, the Court was not required to give an additional instruction on good faith as its instruction on "willfully" was sufficient.

Although a criminal defendant has the right to a meaningful opportunity to present a complete defense, *California v. Trombetta*, 467 U.S. 479, 485 (1984), such right is not absolute. *See Montana v. Egeihoff*, 518 U.S. 37, 42 (1996). A court should refuse a jury instruction if no evidence supports it." *United States v. Ford*, 184 F.3d 566, 579 (6th Cir. 1999). Although the Defendant had no obligation to present any evidence at trial, it was also not the government's burden to prove beyond a reasonable doubt that this defense did not apply to this case. *See United States v. Wolak*, 923 F.2d 1193, 1198 (6th Cir. 1991), *cert. denied*, 501 U.S. 1217 (1991). Additionally, failure to give this instruction did not substantially impair the defense of this case because the jury was already well aware of Defendant's theory of the case. *See United States v. Covington*, 7 Fed.Appx. 386, 389-90 (6th Cir. 2001); *United States v. Laury*, 49 F.3d 145, 152 (5th Cir. 1995). Therefore, this Court upholds its earlier finding that no evidence was produced at trial which would have warranted an instruction for good

faith. It is determined that the charge, taken as a whole, fairly and adequately submitted the issues and applicable law to the jury in this regard and failure to give the proposed instruction did not impair the Defendant's theory of the case. The Court finds no basis to grant a judgment of acquittal or a new trial based on this argument.

B. ADVICE OF COUNSEL

Defendant argues that the Court's failure to give an instruction for reliance on advice of counsel requires the granting of a new trial. Defendant's claims that there was sufficient evidence presented at trial to warrant such an instruction. This Court, however, disagrees. In fact, there was no evidence presented that the Defendant was given any advice from an attorney that the sale of property to Ashtabula County qualified as a involuntary conversion. The only evidence presented at trial that would possibly be relevant to this argument was that Defendant was referred to an attorney knowledgeable in involuntary conversions. No evidence was presented that Defendant received any advice from this attorney or that he relied on such advice.

Defendant refers to *United States v. Ford*, 184 F.3d 566 (6th Cir. 1999), to support his argument. However, the case at bar can be factually distinguished from that case. In *Ford*, the accountant who gave the advice to the defendant actually testified that he did so and testified as to what advice was given. In this case, no one testified that any advice was given to the Defendant nor was there any evidence that he relied on that advice. "A court should refuse a jury instruction if no evidence supports it." *Id.*, at 579.

Additionally, a defendant is entitled to a reliance on the advice of counsel instruction if he shows, "(1) he made full disclosure of all pertinent facts, and (2) he relied in good

faith on the advice." *Id.* This instruction is warranted even without testimony that the Defendant relied on such advice "so long as the circumstances support an inference that he did so rely." *Id.* Even if this Court were to assume that the mere fact that the Defendant met with an attorney knowledgeable in eminent domain law was demonstrative that the two spoke about the transaction in question, there was absolutely no evidence presented at trial that the Defendant made a full disclosure to the attorney of all pertinent facts regarding the transaction.

Because no evidence was presented to support such an instruction, the Court stands by its prior ruling that Defendant's proposed instruction was not proper to be presented to the jury. It is determined that the charge, taken as a whole, fairly and adequately submitted the issues and applicable law to the jury in this regard and failure to give the proposed instruction did not impair the Defendant's theory of the case. Therefore the Court finds no basis to grant a judgment of acquittal or a new trial based on this argument.

C. SECTION 1033

Defendant argues that the jury instructions explaining §1033 and the element of a "substantial tax due" were improper. The §1033 instruction given to the jury was:

> PROPERTY TAKEN THROUGH EMINENT DOMAIN
>
> If a taxpayer sells property to the government under a threat of or imminence thereof of eminent domain, the taxpayer may defer reporting any capital gains incurred from the sale of that property pursuant to 26 U.S.C. §1033. Otherwise, any capital gains incurred

must be reported by the taxpayer the same tax year as the sale.

Defendant claims that the Court should have included that "[a] sale of property is made under threat of condemnation if the taxpayer has reasonable grounds to believe the property eventually will be condemned." Defendant's Proposed Supplemental Jury Instruction 24A. Although argued at trial by the Defendant, he presented no evidence that he had reasonable grounds to believe the property would be taken through eminent domain. In addition, neither the statute nor the regulations mention reasonableness. The case law cited by the Defendant is inapplicable to the case at bar because in the cases cited, the defendant had been put on notice that the property would be taken through eminent domain. No such evidence was presented that defendant received such notice from any person that the property would be taken through eminent domain procedures. Therefore, the additional instruction requested by the Defendant was improper. The Court finds no basis for granting a judgment of acquittal or a new trial based on this argument.

Defendant also argues that the Court erred by not instructing the jury on the effect of §1033 on the element of a "substantial tax due." In the proposed instructions, Defendant requested that the Court include the following: "To prove that a substantial tax was due and owing, the government must also prove beyond a reasonable doubt that the qualified replacement property was not worth at least as much as the gain that was realized from the sale of 4332 Main Avenue." See Defendant's Proposed Jury Instructions, p. 29. As stated above, there was no evidence presented that the property sold to Ashtabula County qualified for tax free status under §1033. Nor was there any evidence that the new property purchased by the Defendant qualified as similar or related property under §1033. Therefore, the inclusion of the

requested instruction would be improper. It is determined that the charge, taken as a whole, fairly and adequately submitted the issues and applicable law to the jury and failure to give the proposed instruction did not impair the Defendant's theory of the case. Based on this, the Court finds no grounds for granting a judgment of acquittal or a new trial based on this argument.

D. CONSPIRATORIAL INTENT

Defendant argues that the Court erred by failing to instruct the jury on conspiratorial intent. Defendant claims that the Court should have instructed the jury on two different types of intent rather than just one. The Government counters by stating that Defendant has given no reason why the instruction provided was insufficient, failing to provide a nexus between the cases cited and the alleged error.

The instruction proposed by the Defendant was:

> In this case the government must prove two different types of intent beyond a reasonable doubt before a defendant can be considered part of a conspiracy to defraud the United States. The government must prove both an intent to agree to participate in a conspiracy to defraud the United States, and an intent to defraud the United States.
>
> Further, a person cannot have the specific intent to defraud the United States unless he knows of the liability for federal taxes alleged in the indictment.
>
> If the government has not proven that a defendant both intended to defraud the United States and

intended to agree with another person to defraud the United States, you must acquit the defendant.

See Defendant's Proposed Jury Instructions, No. 6. Upon review of the instructions given by the Court, it is determined that the jury was instructed, as case law provides, on the basic intent to agree and the traditional intent to effectuate the object of the conspiracy. Both types of intent can be found in the section "Conspiracy to Commit an Offense Basic Elements" given on page 10 of the Jury Instructions, paragraph 2:

> A conspiracy is a kind of criminal partnership. For you to find any one of the defendants guilty of the conspiracy charge, the government must prove each and every one of the following elements beyond a reasonable doubt:
>
> (A) First, that **two or more persons conspired, or agreed, to commit the crimes** of: (1) defrauding the United States and an agency thereof, to wit the IRS of the United States Department of Treasury by impeading, impairing, defeating and obstructing the lawful governmental functions of the IRS in the ascertainment, evaluation, assessment and collection of income taxes; (2) unlawfully, willfully and knowingly attempt to evade a substantial part of the taxes due and owning by defendants Gary Harris, Michael Kotula and Tamara Schwentker Harris; and/or (3) unlawfully, willfully, and knowingly make and subscribe certain individual, corporation, and other U.S. income tax returns, which returns contained and were verified by written declaration that they were made under penalties of perjury, and which the defendants did not believe to be true and correct as to every material matter.

(B) Second, that each of the defendants knowingly and voluntarily joined the conspiracy.

(C) And third, that a member of the conspiracy did one of the overt acts described in the indictment **for the purpose of advancing or helping the conspiracy.**

Based on the above, it is determined that Defendant's argument is without merit. The proposed instruction offered by the Defendant was substantially covered by the charge actually delivered to the jury. It is determined that the charge, taken as a whole, fairly and adequately submitted the issues and applicable law to the jury and failure to give the proposed instruction did not impair the Defendant's theory of the case. Therefore, the Court does not find a basis for granting a judgment of acquittal or a new trial based on this argument.

E. MULTIPLE CONSPIRACIES

Defendant argues that the Court's refusal to give an instruction on multiple conspiracies as requested requires the granting of a new trial. His argument is based on the claim that he did not conspire to evade the taxes of Schwentker-Harris and that the other defendants did not conspire to evade the taxes he allegedly owed. The Government responds by stating that the evidence presented at trial established one conspiracy amongst numerous individuals and as such, a multiple conspiracy charge was unwarranted.

In determining whether the evidence at trial established a single or multiple conspiracy, a court must look to the agreement. *United States v. Warner*, 690 F.2d 545, 548-49 (1982). The government must have demonstrated at

trial "that each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal." *United States v. Martino*, 664 F.2d 860, 876 (2nd Cir. 1981) (citation omitted). However, proof of an actual agreement among the various conspirators is not required to be proven. *Warner*, 690 F.2d at 549. The government must show that the defendant knew "the purpose of the conspiracy, but not necessarily the full scope thereof, the detailed plans, operation, membership, or event the purpose of the other members of the conspiracy." *United States v. Shermetaro*, 625 F.2d 104, 108-09 (6th or Cir. 1980) (citations omitted). Additionally, a single conspiracy does not become multiple conspiracies simply because each member of the conspiracy did not know every other member, or because each member did not know of or become involved in all of the activities in furtherance of the conspiracy." *Warner*, 690 F.2d at 549.

The indictment in this case claims the following conspiracy:

> From on or about January 1, 1994, the exact date being unknown to the Grand Jury, and continuing up to and including the date of this Indictment, in the Northern District of Ohio, Eastern Division, and elsewhere, defendants GARY HARRIS, MICHAEL KOTULA, and TAMARA SCHWENTKER (sic) HARRIS, unlawfully, willfully, and knowingly did combine, conspire, confederate and agree together and with each other to defraud the United States and an agency thereof, to wit the Internal Revenue Service ("IRS") of the United States Department of Treasury, and to commit offenses against the United

States, to wit violations of Title 26, United States Code, Sections 7201[5] and 7206(1).[6]

Therefore, the conspiracy alleged in the indictment was to defraud the United States government by evading federal taxes. The objects of the conspiracy alleged in the indictment are not independent conspiracies, as Defendant appears to argue. A conspiracy may have multiple objectives. *United States v. Collins*, 78 F.3d 1021, 1037 (6th Cir. 1996). A defendant can be found to have participated in only one of the named objectives and still be found guilty of conspiracy.

The evidence at trial showed that Defendant performed various tasks for co-defendant Harris, regarding the corporations, in an attempt to defraud the United States. It is on this objective alone that the jury could have convicted the Defendant of conspiracy. Additionally, it was demonstrated at trial that each of the named defendants agreed to participate in a collective venture to defraud the United States government and that the defendants knew the purpose of the conspiracy.

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[5] §7201. Attempt to evade or defeat tax - Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

[6] §7206. **Fraud and false statements** - Any person who—

(1) **Declaration under penalties of perjury.**--Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

In viewing the evidence in a light most favorable to the Government, *Glasser v. United States*, 315 U.S. 539, 556-57 (1947), this Court finds that the Government's evidence at trial supported an instruction for a single conspiracy. Therefore, it was proper for the Court to not include Defendant's proposed instruction on multiple conspiracies. It is determined that the charge, taken as a whole, fairly and adequately submitted the issues and applicable law to the jury and failure to give the proposed instruction did not impair the Defendant's theory of the case. It is additionally noted that Defendant never claimed in trial that there were multiple conspiracies, he claimed that he was not involved in any conspiracy. Therefore, it cannot be determined that the failure of the court to give the proposed instruction impaired the Defendant's theory of the case. The Court finds no proper grounds to grant a judgment of acquittal or new trial based on this argument.

F. DUTY TO FILE

Defendant argues that the jury instruction regarding the failure to file returns for various entities was improper thus entitling him to a new trial. He claims that because much of the Government's case was based on the failure to file returns for various entities, the key to the Government's case was establishing that he had a duty to file a return on behalf of various corporations or trusts. Defendant further states that the standard charged was inapplicable to the facts of the case. The Government counters by stating that even if the Court had provided such an instruction, the jury could find Defendant had no duty to file returns on behalf of the corporations and still have found him guilty on the conspiracy as charged in Count I. The Government points out three facts things in support of its argument; (1) the resume given by Defendant to his bank stated that he was a

vice president of GH Group is evidence that he was an officer and had a duty to file a return, (2) failure to file returns on behalf of the trusts and corporations was part of the overall conspiracy charge, thus the jury could have properly found Defendant had no such duty and still found him guilty of conspiracy, and (3) to suggest that the jury did find Defendant had such a duty is complete speculation.

Defendant proposed the following instruction which the Court refused to include in the jury charge:

> In support of the alleged conspiracy, the indictment alleges instances in which a defendant or more than one defendant failed to file a tax return, either individually or for a corporation, trust or other entity. I will now instruct you regarding the duty to file tax returns. Mr. Kotula denies that he was obligated to file tax returns on behalf of any of the corporations, trusts, or other entities reference in Count 1 of the indictment.
>
> Section 7343 of the Tax Code, 26 U.S.C. §7343, defines the persons who may be criminally liable for failure to file a tax return. That section provides:
>
> > The term "person: as used in this chapter includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.
> >
> > In addition, federal regulations define who is required to sign a tax return. Treasury Regulation §31.6061-1 provides in pertinent part:

> Each return required under the regulations in this subpart shall, if signature is called for by the form or instructions relating to the return, to be signed by (a) the individual, if the person required to make the return is an individual; (b) the president, vice president, or other principal officer, if the person required to make the return is a corporation; (c) a responsible and duly authorized member or officer having knowledge of its affairs, if the person required to make the return is a partnership or other unincorporated organization; or (d) the fiduciary, if the person required to make the return is a trust or estate.

In determining if Mr. Kotula was a person with a duty to make a tax return for a corporation or trust, you should consider his official position, if any, in relation to any corporation, any historical evidence that he had or had not filed corporate tax returns or was responsible for their preparation in the past, and whether responsibility for preparing tax returns was included in any job description that he may have had. General responsibility for some of a company's affairs does not create a duty to file tax returns.

If you find that a defendant had no duty to file a tax return for a corporation, trust, partnership or other entity in this case, then you should not consider in evidence against that defendant the fact that the corporation, trust, partnership or other entity may not have filed a tax return.

The instruction given by the Court at issue is "Person Required to Collect, Account For and Pay Tax" given on pages 23-24 of the jury charge:

> In support of the alleged conspiracy, the indictment alleges instances in which a defendant or more than one defendant failed to file a tax return, either individually or for a corporation, trust or other entity.
>
> Section 7343 of the Tax Code, 26 U.S.C. §7343, defines the term "person[“] as including "an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occu[r]s."
>
> In determining whether one or more of the defendants had a duty to make a tax return for a corporation or trust, you should consider that defendant's official position, if any, in relation to any corporation or trust. General responsibility for some of a company's affairs does not create a duty to file tax returns. The test as to who is responsible is whom had significant control over the financial decision-making process within the employment entity as would give him the power and responsibility to determine who would get paid and who would not.
>
> If you find that one or more of the defendants had no duty to file a tax return for a corporation or trust in this case, then you should not consider in evidence against that defendant the fact that the corporation or trust may not have filed a tax return.

It is first noted that the instruction is not specifically directed at the Defendant, stating "*a defendant or more than*

one defendant." The Court agrees with the Government that the failure to file returns was part of the overall conspiracy and that the jury could have found Defendant had no duty to file returns and still found him guilty of the conspiracy. However, there was evidence presented by the Government to show Defendant was an officer of one of the entities at issue, the resume Defendant gave to his bank. The resume was evidence the jury *could* have used to find that the Defendant had a duty to file. Any evidence that Defendant was not an officer in any corporation or trust would merely rebut the evidence presented. Additionally, the charge instructed the jury that they could find one or more of the defendants had no such duty. If no duty was found, the jury was instructed to not consider the fact that the corporation or trust didn't file a return against that defendant. It was for the jury to determine what evidence they found most credible. To make the determination, as Defendant suggests,[7] that he had no duty to file a return, would be assuming the jury's duty to weigh the facts in evidence, which this Court will not do.

Reviewing the charge, taken as a whole, the Court finds that the instruction given fairly and adequately submitted the issue and applicable law to the jury. The Court further finds that the charge proposed by the Defendant was substantially covered by the instruction given and does not concern a point so important in the trial that failure to give it substantially impaired the Defendant's defense. Therefore, the Court does not find a basis for granting a judgment of acquittal or a new trial based on this ground.

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[7] Defendant suggests in his motion that the evidence presented, the resume, was "insufficient to establish that he held that office at any particular time for any entity and had an obligation to file any return. This evidence alone would have been insufficient to sustain a finding that Mr. Kotula had an obligation to file returns."

G. HARRIS PLEA AGREEMENT

Defendant argues that the Court erred in its instruction regarding co-defendant Harris's 1997 plea agreement. Defendant's argument is two-fold. First Defendant argues that it was in error for the court to instruct the jury *at all* on the plea agreement. Defendant also argues that the instruction prevented the jury from concluding that plea agreement could provide the Defendant with a defense to the conspiracy for the years of 1994-96. It is noted that Defendant made no prior objection to this instruction.

The portion of the charge that Defendant points to, to support his claim is, "[t]his plea agreement in no way prevents the United States from proceeding with the charges alleged in this indictment." See Jury Instructions, "Defendant Gary Harris's Plea Agreement," paragraph 1, pp. 30-31. Defendant argues that this statement precluded him from presenting the defense that he relied in good faith on the agreement. However, there was no evidence at trial that Defendant relied in good faith on the plea agreement. Therefore, it cannot be determined that the Court's inclusion of this statement in the charge prevented the Defendant from presenting his defense.

Additionally, the Court agrees with the Government that this charge was not pertinent to the Defendant. The instruction, found on pages 30-31, specifically states: "The government is not offering this evidence against either Defendant Michael Kotula or Defendant Tamara Schwentker Harris and you must not consider this evidence against them."

Based on the above, the Court finds that the charge given was a fair, adequate, and correct statement the

governing law as applied to the evidence presented and the inclusion of this instruction did not substantially impair the Defendant's presentation of his defense. Therefore, the Court finds no basis to grant an acquittal or a new trial based on this argument.

II. EVIDENCE

A. CARPA TAPES

Defendant claims that Agent Koritala's testimony regarding Douglas Carpa was erroneously admitted because it was hearsay and it violated his right to confrontation. The testimony was based on taped conversations that Agent Koritala had previously reviewed from the investigation and prosecution of Mr. Carpa in 1992. The tapes had been destroyed by the government prior to this trial.[8]

This evidence was admitted solely against co-defendant Harris. Additionally, the Court gave a limiting instruction to the jury that this evidence was not to be considered against the Defendant. Transcript p. 1292. "[J]uries are presumed to follow their instructions." *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). Based on this, the Court cannot find that Defendant was prejudiced by the admission of this evidence. Defendant's further arguments on this issue will not be addressed. Defendant's argument is found to be without merit and does not provide this Court with proper means to grant a judgment of acquittal or a new trial.

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[8] The Government stated to the Court that the tapes were destroyed as a common practice of the agency and not to prevent their production at trial.

B. CO-DEFENDANT HARRIS'S PURCHASE OF GOLD AND SILVER AND USE OF SECRET ACCOUNTS

Defendant argues that evidence of co-defendant Harris's purchase of gold and silver and use of secret accounts through the Christian Patriots Association, although not admissible against Defendant, prejudiced him by buttressing the strength of the Government's case on Count I. Defendant speculates that this evidence along with the testimony of Agent Koritala, also not admissible against Defendant, caused the jury to conclude that Harris engaged in tax fraud and caused the jury to convict the Defendant because it had to find co-conspirators.

It is noted that the Court instructed the jury to not consider this evidence against Defendant. With a joint trial, there is often a danger of a conviction being based on "cumulative evidence rather than the evidence relating to each defendant." *United States v. Warner*, 690 F.2d 545, 553 (1982). However, "[t]he jury must be presumed capable of sorting out the evidence and considering the case of each defendant separately." *United States v. Frazier*, 584 F.2d 790, 795 (6th Cir. 1978). This Court cannot speculate as to the basis for the jury's finding as Defendant appears to request. Because the jury was instructed that this evidence was not to be considered against the Defendant, and because the jury must be presumed to have considered the evidence only against co-defendant Harris, the Court cannot find that Defendant was prejudiced by the admission of this evidence. Defendant's argument is found to be without merit. Therefore, it would be improper to grant an acquittal or new trial based on this argument. Therefore, it would not be proper to grant an acquittal or new trial based on this argument.

D. BUSINESS RECORDS

Defendant claims that several documents were erroneously admitted by the Court. These include a letter from a paralegal at McDonalds Corporation addressed to Defendant and handwritten notes of Sharp & Fellows referencing a communication with Defendant regarding the purchase of foods.

These documents are not, by definition, considered hearsay. Under Fed. R. Evid. 801(c) hearsay is an out of court statement offered for the truth of the matter asserted. Exhibits #128 and 269 were not offered for the truth of the matter asserted in the documents but were offered to show a connection with the Defendant and the named companies. Therefore, Defendant's argument is without merit.

E. TESTIMONY OF COUNTY COMMISSIONER AND ADMINISTRATOR

Defendant argues that the Court improperly permitted the testimony of Ashtabula County Commissioner Boggs and former County Administrator Condron to impeach the contract for the sale of real property between Defendant and Ashtabula County. Defendant claims that the testimony regarding the negotiations and intent of the parties entering into the contract was improper because the contract was unambiguous. This Court disagrees. The contract was ambiguous as to whether or not there was a threat or imminence of eminent domain proceedings. The only times the subject appears in the contract are the sections which state; (1) the seller recognizes the right of the buyer to institute such proceedings, and (2) the seller desires to sell the property to the buyer to avoid eminent domain proceedings. There is no statement that the property is being sold under a threat of eminent domain proceedings.

Defendant has continually argued that the sale of the property qualified for tax free status under §1033 of the IRS code. That section is entitled "Involuntary Conversions." The introduction of parol evidence regarding whether any person made representations to the Defendant that the property was going to be taken under eminent domain would be proper to determine whether the conversion was actually being made involuntarily.

Additionally, even if the Court accepts Defendant's argument that the only inquiry necessary was whether he "reasonably believed" the property was under a threat or imminence of eminent domain proceedings, the presentation of parol evidence would still have been necessary to determine whether Defendant's belief was reasonable. Therefore, based on the above, the Court finds this argument to be without merit. The above stated ground does not provide a proper basis for this Court to grant a judgment of acquittal or a new trial.

F. HARRIS'S TESTIMONY BEFORE A PENNSYLVANIA COURT

Defendant argues that the testimony of co-defendant Harris, presented by the Government and read into the record, from a Pennsylvania state court was improperly admitted against him as a co-conspirator statement because the statements were not in furtherance of the conspiracy alleged in the indictment. Defendant further claims that his right to confrontation was also violated because he did not have the opportunity to cross-examine Harris. The Government counters by arguing that the statements made by Harris were done in furtherance of the conspiracy by attempting to regain control of Conneaut Lake Park.

Defendant's evidentiary argument is based under Fed. R. Evid. 804(b)(1), which states:

> (b) Hearsay exceptions. - The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> > (1) Former testimony. - Testimony given ... in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, ... had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

However, under Rule 801(d)(2)(E) a co-conspirator's statement is not hearsay if: "[t]he statement is offered against a party and is ... a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." In order to admit the statement of a co-conspirator under Rule 801 (d)(2)(E), "it must first be determined that the conspiracy existed, that the defendant was a member of the conspiracy, and that the co-conspirator's statements were made in furtherance of the conspiracy." *United States v. Gessa*, 971 F.2d 1257, 1261 (6th Cir. 1992) (enbanc) (internal quotation marks omitted). A statement is found to be in furtherance of a conspiracy "if it is intended to promote the objectives of the conspiracy." *United States v. Monus*, 128 F.3d 376, 392 (6th Cir. 1997) (quotation omitted).

The Court found during trial, and reaffirms in this Order, that a conspiracy to evade federal taxes did exist. Both Defendant and co-defendant Harris were members of that conspiracy. The statements made by co-defendant Harris in the Pennsylvania case were co-conspirator's statements which were made in furtherance of the conspiracy charged in this indictment. The statements occurred during the time of the conspiracy alleged in the indictment. They were in

regards to the operation and transfer of one of the business entities named in the indictment, Conneaut Park. The evidence was demonstrative of the Government's claim that the transfer of this business was done to prevent it from being seized to pay co-defendant Harris's tax liabilities. This transfer occurred with the assistance of the Defendant. Harris, with the assistance of the Defendant then attempted to regain control of the Park.

Defendant makes the Constitutional argument that even if the statements were proper co-conspirator statements, they should have been excluded based on the Confrontation Clause due to his inability to cross-examine Han-is. The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against." Defendant cites *Crawford v. Washington*, 124 S.Ct. 1354 (2004), which states, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 1374. The Court notes that *Crawford* was issued after this trial was completed.

This Court recognizes that the statements made by Harris would fall under the Supreme Court's definition of a testimonial statement and thus would normally require confrontation. However, the Court finds Defendant's claim lacks merit. Upon review of the transcript, it is determined that the only portion of Harris's testimony read into the record which discusses the Defendant is the very portion that Defendant requested be read to the jury. See Transcript p. 2960, 2997. It is unclear how Defendant can argue he deserves a new trial based on evidence that he specifically requested be admitted.

Based on the above, the Court finds this argument to be without merit. The above stated ground does not provide a proper basis for this Court to grant a judgment of acquittal or a new trial.

G. 404(b) EVIDENCE

Defendant argues that the admission of other acts evidence pursuant to Rule 404(b) was improper and prejudicial. Defendant raises no further issues than those that were raised in his Memorandum in Opposition to Government's Motion in Limine to Admit Evidence. (Doc. #137) A hearing was held on the motion and the parties presented arguments before the Court regarding these issues prior to trial. The Court made extensive rulings on the record regarding the admissibility of this evidence. The Court stands by its prior ruling and does not find that the 404(b) arguments presented in the present motion wan-ant the granting of an acquittal or a new trial.

H. EVIDENCE NOT ADMISSIBLE AGAINST DEFENDANT AND LIMITING INSTRUCTIONS

Defendant claims that the extent of evidence admitted against co-defendant Harris, which was inadmissible against him and the number of limiting instructions given by the Court lead to his conviction and therefore he should be granted a new trial. The Government points out that Defendant only points to three limiting instructions that were given by the Court.

The case cited by the Defendant in support of his argument is *United States v. Costin*, 2003 WL 839236. In *Costin*, the district court granted a new trial based on its belief that the jury was likely confused by the number of limiting instructions, thus making the "instructions' efficacy

compromised." *Id.* at 4. The Sixth Circuit upheld the district court's ruling. *Id.* In that case, nearly 100 limiting instructions were given. In the case at bar, merely a handful were given. This Court cannot find that the jury was likely confused or that the sufficiency of the instructions were compromised by the number of limiting instruction given. Additionally, "juries are presumed to follow their instructions." *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). Therefore, this Court must presume that the limiting instructions given were followed by the jury and any evidence that was not admissible against the Defendant was not considered against him in their deliberations or verdict. Therefore, the Court finds this argument to be without merit. The above stated ground does not provide a proper basis for this Court to grant a judgment of acquittal or a new trial.

I. ORGANIZATIONAL CHARTS

Defendant argues that the Court erroneously admitted an undated handwritten organizational chart, referencing the Defendant, which was found in a briefcase located in a vault during the execution of a search of co-defendant Harris's building. Defendant claims that the document lacked foundation, authentication, and relevancy because there was no evidence regarding when it was written or who wrote it. It is alleged that Defendant suffered prejudice because the document was used by the Government in an attempt to link him to the entities reference therein. The Government points out that the fact the item was undated goes to weight of the evidence and not admissibility. The Government further states that the documents were properly authenticated by Agent Torbic as items found in the safe at the building and were properly admissible as evidence of the conspiracy between co-defendant Harris and the Defendant. As stated at sidebar during the trial, the fact that the document is undated goes to weight of the evidence and not admissibility. The

document was relevant and probative in establishing what role Defendant had with co-defendant Harris's companies. The foundation was laid and the document authenticated during Agent Torbic's testimony. The Court stands by its prior ruling that the document was admissible. Based on the above, it cannot be determined that this argument is a proper basis to grant a judgment of acquittal or a new trial.

J. TITLE COMPANY RECORDS

Defendant claims that Government's Exhibit 370 was improperly admitted. This exhibit was a letter from the Defendant which had a business card attached. Defendant's argument is based on the fact that the original was not produced and because the witness had no idea how the card was received or why it was stapled to the letter. Defendant claims that based on this, the document lacked authentication and was unreliable. Defendant further claims that the inclusion of this evidence prejudiced him by "leading the jury to believe" that JMJ Associates, Defendant's company, was affiliated with and acting for co-defendant Harris.[9] The Government counters by stating that the exhibit was properly admitted as a business record.

First the Court will note that the original document was not required to be admitted. Under Fed. R. Evid. 1003, a

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[9] Defendant additionally argues that "numerous title company records had apparently been selectively copied by the government and were introduced without originals being made available." Defendant states that the documents should have been excluded because they were unauthenticated and without foundation. However, Defendant does not state which exhibits he is referring to. Additionally, Defendant makes no reference to this argument in his reply. Because the Court is unclear as to what exhibits are at issue, it is unable to rule on the substance of this claim.

duplicate is admissible to the same extent as the original unless there is a "genuine question raised as to the authenticity of the original or if it would be unfair to admit the duplicate in lieu of the original. Defendant's counsel never questioned the authenticity of the original, nor did he state any reason why it would be unfair to admit the document. Therefore, the Court finds no reason that it should have been excluded under Rule 1003. The question raised by the Defendant was in regards to how the exhibit was produced, the business card being stapled to the letter. Secondly, the testimony of Mr. Kornbau laid a sufficient foundation that the exhibit was a business record which was kept in the course of a regularly conducted business activity. Transcript pp. 1378-1383.

Based on the above, the Court finds Defendant's argument to be without merit. Therefore, it cannot be determined that this argument is a proper basis to grant a judgment of acquittal or a new trial.

III. DENIAL OF MOTION TO SEVER

Defendant claims that he was prejudiced by this Court's denial of his motion for severance by depriving him of his right to present co-defendant Gary Harris as a witness on his behalf Defendant only references this argument to Count I. The Government responds by stating that the Defendant has not demonstrated a reason as to why he was entitled to a separate trial. The Court held a hearing regarding this and other pending motions on December 29, 2003. The Court heard arguments on this motion and ruled from the bench, denying it.

It is first noted that this second motion for severance was untimely filed. The motion was filed almost three months after the deadline to file pretrial motions had expired

and only a week prior to trial. Defendant never requested leave of court to file the motion. In addition, the motion was filed the morning of the scheduled motion hearing, leaving no opportunity for the Government to respond.

"There is a preference in the federal system for joint trials for defendants who are indicted together." *Zajiro v. United States*, 506 U.S. 534 (1993). Joint trials "play a vital role in the criminal justice system." *Richardson v. Marsh*, 481 U.S. 200, 209 (1987). In promoting efficiency they "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Id.*, at 210. Additionally, Fed. R.Crim. P. 8(b) provides that joinder is permissible if the defendants are alleged to have participated "in the same series of acts or transactions constituting an offense or offenses." Therefore, when an indictment charges multiple defendants with participating in a single conspiracy, joinder is proper. *United States v. Warner*, 690 F.2d 545, 551 (1982). However, Fed. R. Crim. P. 14 gives a district court the power to sever the trial when joinder would be prejudicial: "If it appears that a defendant or the government is prejudiced by a joinder of... defendants ... for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

"When a defendant seeks severance, he has a heavy burden of showing specific and compelling prejudice ... ." *United States v. Causey*, 834 F.2d 1277, 1287 (6th Cir. 1987). Under Rule 14, a defendant may justify a separate trial when he can demonstrate that a co-defendant would be willing to testify on his behalf would not invoke the Fifth Amendment and would exculpate the defendant. *United States v. Whitley*, 734 F.2d 1129, 1139 (6th Cir. 1984), overruled on other grounds, see *United States v. Robinson*, 887 F.2d 651 (6th Cir. 1989). The test for determining whether severance

should be granted based on the proposed testimony of a co-defendant requires the defendant to demonstrate, "(1) a bona fide need for the testimony, (2) the substance of the testimony, (3) its exculpatory nature and effect, and (4) that the co-defendant will in fact testify if the cases are severed." *Id.* "[D]efendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." *Zajiro v. United States*, 113 S.Ct. 933 (1993).

Defendant filed his second motion for severance on December 29, 2004. The trial was scheduled to begin a week later, on January 5, 2004. In the motion, Defendant stated for the first time that co-defendant Harris was willing to testify on his behalf if the trials were severed.[10] Defendant offered the affidavit of co-defendant Harris, to satisfy the above factors. Also, during the hearing, the Court asked of co-defendant Harris his intentions regarding the proposed testimony. Upon review of the motion and affidavit, and considering the argument and statements made at the hearing, the Court found the affidavit to not be credible. It was determined that the affidavit and promise to testify were merely a tactic by co-defendant Harris to once again delay the trial.

The indictment was issued on July 8, 2003. During the pendency of the case, co-defendant Harris terminated the services of two prior attorneys, proceeded pro se for several months, and attempted to fire his last attorney the first day of trial. Throughout the time this case was pending, Han-is filed

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[10] This argument was not raised in Defendant's first motion for a new trial which was filed on August 18, 2003.

a stack of motions, many of which were frivolous.[11] Some of the motions were filed pro se while he had an attorney representing him. This trial was originally scheduled to begin on September 8, 2003. Harris filed a motion to continue the trial date and deadline for filing pretrial motions on August 11, 2003. This motion was later withdrawn. Defendant filed a motion to continue the trial and motion deadline on August 18, 2003. Co-defendant Schwentker-Harris also filed a motion to continue the trial on August 21, 2003. The Court granted Defendant's motion for a continuance and reset the deadline to file pretrial motions to September 19, 2003 with

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[11] The following are all the motions filed by Defendant Harris or an attorney acting on his behalf (excluding motions for continuances to trial date or pretrial motions) : motion to correct the record; motion for order to provide defendant access to basic needs; motion for reconsideration and or to correct the record; motion to strike the indictment; motion for reconsideration, to transfer the case and to enforce the plea agreement; amended supplemental to motion to quash the indictment and motion to strike indictment; second motion requesting a ruling for basic needs; motion for leave to withdraw pending motions; motion for reconsideration of detention order; motion for enforced compliance with amended criminal trial order; motion to preclude testimony of government agents; motion to dismiss indictment or alternatively to strike certain alleged overt acts; motion to suppress search; motion to limit reading of overt acts; supplemental to motion for reconsideration of detention; supplemental to motion to preclude testimony of government agents; supplemental brief to motion to suppress; declaration regarding Exhibit C to government's response to motions; supplemental brief in support of motion for reconsideration of detention; motion for leave to file supplemental brief in support of motion for reconsideration; motion to unseal records; motion to correct statement in defendants motion to dismiss; second supplemental brief in support of motion fer reconsideration; motion for release of additional discovery of 70,000 pages; motion to bar testimony of James Fisher; motion to bar testimony of proposed summary witnesses; motion for judgment of acquittal; motion to extend time for filing objections to the pre-sentence report and to reschedule sentencing; and motion to transfer probation violation to sentencing judge.

a hearing set for September 26, 2003. The trial was continued to October 6, 2003. On September 5, 2003 Defendant again moved for a continuance of the trial date. On September 17, 2003, co-defendant Harris filed a motion to reschedule the trial date and extend the time to file pretrial motions. On September 26, 2003 the Court held a status and granted the motion to continue and reset the trial date for January 5, 2004. The deadline to file pretrial motions was reset for October 29, 2003. On October 15, 2003 co-defendant Harris again motioned to extend the motion filing deadline which was denied. On December 22, 2003 co-defendant Schwentker-Harris moved to have the trial continued, which was denied.

Due to the multiple attempts to delay this trial, the Court found co-defendant Harris's affidavit was not based on a true desire to testify but was merely a tactic to once again cause delay. The Court stands by its prior order denying severance, finding that the interest of justice would not have been furthered by severing Defendant's trial. Therefore, the Court does not find this argument would merit the granting a judgment of acquittal or a new trial.

"[A] defendant is not entitled to a severance simply because the evidence against a codefendant is far more damaging than the evidence against him." *United States v. Causey*, 834 F.2d 1277, 1288 (6th Cir. 1987). "The presentation of evidence applicable to more than one defendant is simply a fact of life in multiple defendant cases." *Id.*

1V. JURY SELECTION

Defendant claims that the jury selection process was prejudicial, elevating expediency over fairness. The

Government rebuts this argument by stating that the Defendant does not demonstrate how he was prejudiced. Defendant claims that the Court violated Fed. R. Crim. P. 24(a). Rule 24 (a) states:

> (1) **In General**. The court may examine prospective jurors or may permit the attorneys for the parties to do so.
>
> (2) **Court Examination**. If the court examines the jurors, it must permit the attorneys for the parties to:
>
> > (A) ask further questions that the court considers proper; or
> >
> > (B) submit further questions that the court may ask if it considers them proper.

The Court permitted the parties to submit proposed questions for the jury questionnaire. These were considered when making the actual questionnaire presented to the jury pool. The Court included only those questions which were proper in this case. Counsel were given adequate time to review the questionnaire and raise concerns regarding it. The questionnaire presented to the jury pool was quite lengthy. Once the questionnaires were filled out and reviewed by the Court and counsel, counsel were permitted to individually voir dire the prospective jurors whose questionnaire's raised concerns.[12] Due to the lateness of the hour, the Court performed an oral voir dire. Counsel was restricted from conducting their own oral voir dire, but were asked, at sidebar, to submit any further questions that remained. The Court presented those questions it determined proper for this action.

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[12] A large number of the jury pool was individually voir dired by counsel.

The only question regarding voir dire is whether the court ensured the defendants had "a fair trial by a panel of impartial, 'indifferent' jurors." *Irving v. Dowd*, 366 U.S. 717, 722 (1960). This Court so finds that the panel of jurors selected to hear this case were impartial and indifferent.

Based on the above, it is determined that the Court abided by the requirements of Rule 24. Defendant's argument is found to be without merit. There is no proper means to grant a judgment of acquittal or new trial based on this argument.

A. LATENESS OF THE HOUR JURY WAS SELECTED

Defendant claims that it was prejudicial to require counsel, the parties and jury pool to stay until 9:00 p.m. in order to select a jury. It is noted that voir dire did not begin in this case until early afternoon due to one of the defendant's counsel failing to show up until then. The Court stated to counsel this reason for continuing jury selection into the late hours. The jurors were not informed about any reason for the delay. The Court further stated that it did not want to require all jurors to have to report for an additional day, as they arrived at 8:30 a.m. that morning and because the weather forecast for the following day was to be snowy. The Court felt that the jurors would be "much happier to complete this tonight rather than bring them in at 9:00 am. on a snowy, icy morning."

Defendant does not state in his motion how the lateness of the hour was prejudicial to him. No jurors commented on being held late. The Court cannot speculate that any jurors secretly held some type of secret prejudice against the Defendant because of the delay. In addition, this trial lasted for weeks. It is highly unlikely that any juror

would have continuously held any prejudice against the Defendant for the entire length of the trial. Therefore, it cannot be determined that the Defendant was prejudiced by the lateness of the hour that the jury was selected. Defendant's argument is without merit and thus does not present a valid basis for this Court to grant a judgment of acquittal or a new trial.

B. JURY QUESTIONNAIRES

Defendant claims that he was prejudiced by the Court's refusal to submit his proposed questionnaire in its entirety. All counsel were permitted to file written voir dire questions to the Court. The Court accepted and rejected questions presented by the parties depending on whether they were proper, as is its discretion. *Mu'Min v. Virginia*, 500 U.S. 415,424 (1991) (stating that a district court "retains great latitude in deciding what questions should be asked on voir dire."). Additionally, under Fed. R. Crim. P. 24, the Court is not required to allow counsel to ask questions of the jury and may conduct voir dire completely on its own, with no input from the defendants. Therefore, the Court does not find that Defendant was prejudiced by its failure to submit Defendant's proposed questionnaire to the jury. Defendant's argument is found to be without merit and thus does not present a valid basis for this Court to grant a judgment of acquittal or a new trial.

C. DENIAL OF ORAL VOIR DIRE

Defendant states that he was prejudiced when the Court, which had initially told counsel that they would be permitted to conduct oral voir dire, refused to allow such due to the lateness of the hour. As stated above, this Court was under no obligation to allow counsel to perform oral voir dire under Fed. R. Crim. P. 24(a). In an attempt to obtain

input from counsel regarding oral voir dire, counsel was called to sidebar and asked to submit any questions they believed remained. The Court considered this input when it asked further questions of the jury pool. In addition, as stated prior, counsel was given the opportunity to individually voir dire all persons from the jury pool who's questionnaire's raised concerns.

Based on the above, the Court does not find that Defendant was prejudiced by its failure to allow Defendant's counsel to perform oral voir dire of the jury pool. Defendant's argument is without merit and thus does not present a valid basis for this Court to grant a judgment of acquittal or a new trial.

D. LIMITED VOIR DIRE BY THE COURT

Defendant states that he was prejudiced by the Court's alleged "limited voir dire" and its refusal to ask three additional questions submitted in handwriting to the Court. Upon review of the handwritten questions provided by Defendant, the Court found them to be irrelevant and improper. Defendant does not state how he was prejudiced by the Court's refusal. A district court "retains great latitude in deciding what questions should be asked on voir dire." *Mu'Min v. Virginia*, 500 U.S. 415, 424 (1991).

As stated above, this Court was under no obligation to present Defendant's proposed questions to the jury pool and used its discretion in denying to do so. Therefore, the Court finds Defendant's argument to lack merit and thus does not present a valid basis for this Court to grant a judgment of acquittal or a new trial.

V. DENIAL OF MOTION TO DISMISS

Defendant claims that he was prejudiced by the Court's failure to dismiss Counts I and V prior to trial. Defendant argues that Count V should have been dismissed because he established that the income he received in 1998 from a sale of property to Ashtabula Count was not required to be reported because it was part of a involuntary conversion. Defendant further argues that Count I should have been dismissed because the Government failed to instruct the grand jury regarding the law of exchange based on involuntary conversion. The Court will first address Count I.

"[A] defendant wishing to challenge an indictment valid on its face bears a heavy burden." *United States v. Lamoureux*, 711 F.2d 745, 747 (6th Cir. 1983). An indictment is sufficient "if it states the offense using the words of the statute itself, as long as the statute fully and unambiguously states all the elements of the offense." *United States v. Monus*, 128 F.3d 376, 388 (6th Cir. 1997) (internal quotation marks and citations omitted). A court must look to (1) "whether the indictment contains the elements of the offense charged and fairly informs a defendant of the charges against which he must defend," and (2) whether the indictment "enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Id.* (citation omitted).

Defendant claims that the Government made misrepresentations to the grand jury on the issue of involuntary conversions. However, this Court refused to do an in camera review of the grand jury transcripts. Therefore, the Court may not speculate as to what was or was not presented before the grand jury. However, a review of the grand jury transcript is not necessary on this issue because whether the Defendant qualified for a §1033 involuntary conversion would be a defense to the charges. The

Government was under no duty to present this defense to the grand jury. Therefore, it cannot be determined that the Government acted in bad faith in failing to present such evidence. "The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *United States v. Calandra*, 414 U.S. 338, 344-45 (1974).

The indictment in this case is valid on its face. Therefore, the Defendant may not challenge it based on the argument that the grand jury acted on inadequate evidence. In addition, the Court agrees with the Government that the fact that a petit jury found the Defendant guilty on the charges, even when Defendant argued profusely that he qualified for a involuntary conversion under the IRS code, certainly demonstrates that the grand jury would have found probable cause to indict in an ex parte hearing with or without evidence or instruction on involuntary conversions.

Defendant also argues that Count V should have been dismissed prior to trial. He claims he established that the income he received from the sale of his property to Ashtabula County was not required to be reported because it was part of a involuntary conversion. Defendant, in his motion, mischaracterizes the evidence presented, stating that "the Ashtabula County Commissioner's made the official finding in their contract with Mr. Kotula that the sale was made under threat of eminent domain." See Defendant's Motion for Judgment of Acquittal or in the alternative for a New Trial, p. 27. The contract presented at trial did not state that there was an official finding that the sale was made under threat of eminent domain, it stated that the Defendant recognized the right of the County to commence proceedings

under eminent domain. Whether or not the property qualified for a involuntary conversion, thus being a defense to Count V, was an issue to be determined by the jury. There was no other evidence presented by the Defendant that would have supported a motion to dismiss. As stated above, the fact that a petit jury found the Defendant guilty on the charges, even when Defendant argued profusely that he qualified for a involuntary conversion under the IRS code, certainly demonstrates that the Court could not find as a matter of law that Government could not prove the element of intent for the charge of tax evasion.

The Court stands by its prior denial of the motion to dismiss and does not find that the arguments presented by the Defendant warrant a judgment of acquittal or new trial on this issue.

VI. COURT'S REFUSAL TO REVIEW GRAND JURY TRANSCRIPTS

Defendant claims that the Court erred in refusing to review the grand jury transcript in this action. Defendant states that if this Court would have reviewed the transcripts, it would have discovered that the prosecutor misled the grand jury by failing to instruct them on §1033. Defendant further argues that the Court could not make an informed determination on his motion to dismiss the indictment, which was based on this argument, without such a review. The Government counters by stating that the Defendant has presented no valid argument which would change the Court's prior determination not to review the transcripts.

In order for a court to require disclosure of a grand jury transcript the defendant must demonstrate a "compelling necessity" that requires breaking the "indispensible secrecy of grand jury proceedings" *United States v. Proctor &*

Gamble Co., 356 U.S. 677, 681 (1958). "This compelling necessity must be demonstrated by establishing a 'particularized need' rather than a general one." *Id.*, at 683. The burden is on the defendant to show that a 'particularized need' exists which outweighs the policy of secrecy. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959).

The Sixth Circuit, in *United States v. Short*, discussed the problem a district court faces when deciding whether to review a grand jury transcript:

> It follows that the public interest in maintaining the secrecy of the grand jurors' deliberations and the interest of the accused in exposing them may often be in direct conflict. The responsibility of evaluating these conflicting considerations in the interest of truth and justice is a delicate one. It is unthinkable that the decision should be left to the bias of an accused or his counsel, or to the inexperience of a juror. Logically, the responsibility for relaxing the rule of secrecy and of supervising any subsequent inquiry should reside in the court, of which the grand jury is a part and under the general instructions of which it conducted its judicial inquiry.

United States v. Short, 671 F.2d 178, 184 (6th Cir. 1982) (citing *Cobbledick v. United States*, 309 U.S. 323, 327 (1940)).

As stated above, qualifying under §1033 as an involuntary conversion would be a defense to the charge of tax evasion. The Government was under no duty to present this defense before the grand jury. It is determined that the Defendant failed to show a compelling necessity for the transcript which would outweigh the policy of secrecy of

grand jury proceedings. Therefore, the Court stands by its prior ruling that it was proper to not perform an in camera review of the grand jury transcripts. Defendant's argument is without merit and presents no basis for granting a judgment of acquittal or a new trial.

VII. TESTIMONY OF JAMES FISHER

Defendant claims that he is entitled to a new trial because he was not provided with adequate notice of the Government's witness, James Fisher, and because no Daubert hearing was held by the Court. Defendant argues that Fisher was unqualified to testify in this case. The Government counters the first argument by stating that it did provide adequate notice to the Defendant of Fisher's qualifications and summary of his testimony. The Government countered the second argument by stating that no Daubert hearing was required because Fisher's testimony was "very basic" and dealt with "uncontroverted principles of tax law." Additionally, the Government notes that there was no question that Defendant would owe approximately $82,000 in capital gains taxes if he did not qualify for a involuntary conversion under §1033 and that Defendant was given a full opportunity to cross-examine Fisher regarding his qualifications.

A. LACK OF NOTICE

Defendant states in his motion that the summary of Fisher's argument was not provided to him until the "eve of trial." This statement, however, is incorrect, as evidenced in Defendant's reply brief. Defendant states in his reply that he received the summary of Fisher's proposed testimony "weeks before trial." It cannot be determined that Defendant was ambushed by the Government with Fisher's testimony when he received a summary of it with substantial time to review it

and prepare any rebuttal to it. Therefore, the Court finds that the Government complied with Fed. R. Crim. P. 16 in its disclosure.

B. DAUBERT HEARING

It is first noted that Defendant did not even request a Daubert hearing until the eve of trial. Defendant states that the Court should have held a Daubert hearing because Fisher was unqualified due to the fact that he had only testified as an expert once before and because he had never audited a §1033 exchange. The fact that the witness had only testified once before goes to the weight the jury gives the witness's testimony and not to admissibility. It is noted that this fact was brought to the jury's attention during Defendant's cross-examination. Transcript. p. 2749. Additionally, the fact that Fisher had never audited a §1033 involuntary conversion does not affect his offered expertise as the Government did not present Fisher as an expert on §1033 exchanges, he was offered as an expert on audits. This fact was also addressed in Defendant's cross-examination. The Government solicited sufficient testimony from Fisher on his qualifications as an expert on this subject. The Court found no need to hold a Daubert hearing. The fact that Fisher he never performed an audit on a §1033 involuntary conversion would go to the weight of the offered testimony, not admissibility. The Government did not have a burden to disprove Defendant's theory of the case.

Based on the above, the Court finds Defendant's argument to be without merit. Therefore, no proper grounds are found to grant an acquittal or new trial.

VIII. SUFFICIENCY OF THE EVIDENCE

Defendant claims that his Rule 29 motion at the end of the Government's case and at the end of trial should have been granted because no rational jury could have found Defendant guilty on either count. The Government rebuts this argument by stating that there was sufficient evidence presented at trial to support the conviction. This Court agrees.

The standard of review for a sufficiency of the evidence claim is "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is not the Court's obligation to "weigh the evidence, assess the credibility of the witnesses, or substitute [its] judgment for that of the jury." *United States v. Salgado*, 250 F.3d 438, 446 (6th Cir. 2001). All available inferences and issues of credibility are drawn in favor of the jury's verdict. *Id.* A defendant claiming insufficiency of the evidence "bears a heavy burden." *United States v. Maliszewski*, 161 F.3d 992, 1005 (6th Cir. 1998). The government may "meets its burden through circumstantial evidence alone, and such evidence need not exclude every possible hypothesis except that of guilt." *Salgado*, 250 F.3d at 446. The government need not "prove a formal agreement – a tacit or mutual understanding to engage in a common plan is sufficient." *United States v. Collins*, 78 F.3d 1021, 1037 (6th Cir. 1996) (citing *United States v. Elizey*, 874 F.2d 324, 328 (6th Cir. 1989)).

Defendant first argues that the evidence was insufficient for a jury to determine that he evaded Schwentker-Harris's taxes as claimed in the indictment. As stated above, this argument is without merit as it was only one of the listed objectives in the indictment.

Defendant's second argument is that he was convicted based on speculation and innuendo, not on evidence connecting him to the conspiracy in the indictment. This Court disagrees. In order for the Government to prove a conspiracy, four essential elements must be shown: "(1) that the conspiracy was willfully formed and existed at or about the time alleged in the indictment; (2) that the accused willfully became a member of the conspiracy; (3) that one of the conspirators thereafter knowingly committed at least one overt act charged in the indictment at or about the time and place alleged; and (4) that such overt act was knowingly done in furtherance of some objective or purpose of the conspiracy as charged." *United States v. Kraig*, 99 F.3d 1361, 1368 (6th Cir. 1996).

The evidence presented at trial established that the Defendant was intrinsically involved with the companies of Harris. Evidence also established that he assisted Harris in evading taxes through these companies. Although there was no direct evidence that Defendant conspired with Harris to evade federal taxes, circumstantial evidence is sufficient. *Glasser v. United States*, 315 U.S. 60, 80 (1942) (stating, "[p]articipation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a development and a collation of the circumstances." (internal quotation omitted)), superseded by rule; Fed. R. Evid. 104(a), 801 (d)(2)(E). The Court finds that there was sufficient evidence to support the Defendant's conviction for Count I.

Defendant also argues that a judgment of acquittal is proper on Count V because no properly instructed or rational jury could have found that he, through his good faith reliance on counsel and the provisions of §1033, intended to evade his taxes. Defendant once again makes the arguments of good faith and reliance on counsel. As stated above, these

arguments are without merit. In order for the Government to prove income tax evasion as found in Count V, it must establish, "the existence of a tax deficiency, willfulness, and an affirmative act constituting evasion or attempted evasion of the tax." *United States v. Daniel*, 956 F.2d 540, 542-43 (6th Cir. 1992). There was evidence presented at trial that Defendant did sell the property at issue to Ashtabula County and that he did not file capital gains taxes on that property as required. Therefore, there was sufficient evidence to convict the Defendant on Count V.

Based on the above, it is determined that Defendant's argument is without merit. The Court finds no grounds to grant a judgment of acquittal or a new trial based on this claim.

X. MANIFEST WEIGHT OF THE EVIDENCE

Defendant claims that his conviction was against the manifest weight of the evidence but makes no argument to support this argument. When considering a motion for a new trial based upon the weight of the evidence, district courts can "consider the credibility of the witnesses and the weight of the evidence to insure that there is not a miscarriage of justice. It has often been said that he/she sits as a thirteenth juror." *United States v. Ashworth*, 836 F.2d 260, 266 (6th Cir. 1988).

The Court found the Government's witnesses to be very credible. Additionally, as stated above, there was sufficient evidence presented to support a conviction on these charges. The Court does not find that a miscarriage of justice has occurred with Defendant's conviction and agrees that this is the proper verdict. Based on the above, it is determined that Defendant's argument is without merit. The

Court finds no grounds to grant a judgment of acquittal or a new trial based on this claim.

X. RESPONSE TO JURY QUESTION DURING DELIBERATIONS

Defendant argues that the Court's response to a jury question during deliberations was erroneous and prejudicial. The question at issue was presented by the jury, during deliberations, on February 2, 2004. The question stated, "[d]oes the commissioner's signature on the Mike Kotula eminent domain bldg. sale ensure us that this was a legal transaction? Does the commissioner's signature mean it was legal or can a commissioner make an error?" Doc. #320. The Court responded to the question by stating, "These are matters for you to decide based on the evidence."

Defendant argues that the Court should have answered "Yes" to the first question and "No" to the second.[13] There was nothing in the jury instructions which addressed the issue. The Government responds to this argument by stated that the Defendant is speculating as to the basis behind the jury question.

Defendant opines that the jury was asking for construction of the contract between himself and Ashtabula County. However, it is not for this Court to speculate as to what the jury was thinking when forming their question. In addition, it would be improper for the Court to use such speculation to form its answer.

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[13] Defendant did not claim that the second question should be answered with a "No" response until his reply brief. Nothing was said regarding this answer in the motion, nor was anything said when the jury question was discussed with counsel. Counsel stated that the second question could not be answered.

The evidence presented at trial included the sales agreement between Defendant and Ashtabula County and the testimony of county officials as to whether the sale was made under the threat of eminent domain procedures. Interpretation of this evidence was solely within the province of the jury. The Court could not instruct the jury on whether the commissioner's signature made the contract legal or whether the commissioner made an error with the contract or its meaning. These are clearly questions of fact which were for the jury to decide. Therefore, the Court's answer to the jury's question was neither erroneous nor prejudicial to the Defendant. This argument is found to be without merit. It would not be proper for this Court to grant a judgment of acquittal or a new trial based on this argument.

CONCLUSION

Based on the above, it is hereby determined that Defendant's motion for a judgment of acquittal or in the alternative new trial is found to be without merit. Therefore, Defendant's Motion is DENIED.

So ordered.

s/ Judge John R. Adams
JUDGE JOHN R. ADAMS
UNITED STATES
DISTRICT JUDGE

Date: June 30, 2004

NOT RECOMMENDED FOR FULL--TEXT PUBLICATION
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Filed: October 10, 2006

Nos. 04-3996 / 04-3997 / 04-4030

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES of America,	)
	) ON APPEAL FROM
Plaintiff-Appellee,	) THE UNITED STATES
	) DISTRICT COURT
v.	) FOR THE NORTHERN
	) NORTHERN
Gary HARRIS,	) DISTRICT OF OHIO
	)
Defendant-Appellant.	)
	)
_____	)
	)
United States of America,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
Tamara Schwentker-Harris,	)
	)
Defendant-Appellant.	)
	)
_____	)

United States of America,

Plaintiff-Appellee,

v.

Michael Kotula,

Defendant-Appellant.

BEFORE: MOORE, GRIFFIN, and CUDAHY,* Circuit Judges.

GRIFFIN, Circuit Judge.

A Northern District of Ohio jury convicted defendants Gary Harris, Tamara Schwentker-Harris ("Schwentker"), and Michael Kotula of conspiracy to defraud the IRS in violation of 18 U.S.C. § 371. The jury also convicted Harris on three counts and Kotula on one count of tax evasion in violation of 26 U.S.C. § 7206. All three defendants appeal. For the reasons that follow, we affirm Harris's four convictions but remand for resentencing due to *Booker* error and errors in the application of the Sentencing Guidelines. Regarding Kotula, we affirm his conspiracy conviction but remand for resentencing on that count due to a *Booker* error; we also vacate Kotula's tax-

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* The Honorable Richard D. Cudahy, United States Circuit Judge for the Seventh Circuit, sitting by designation.

evasion conviction and remand for a new trial on that count alone. With respect to Schwentker, we affirm her conspiracy conviction but remand for resentencing due to a *Booker* error.

I.

Harris created a network of businesses called GH Group and, by the 1990s, had a personal net worth of $11 million. Kotula began working for Harris in 1985 and became his "right-hand man" with managerial authority throughout GH Group.

Harris and Schwentker were romantically involved, and Schwentker bore Harris three children. In 1993, while working at a restaurant, Schwentker founded T & M Consulting, Inc. ("T & M"). The government alleges that Schwentker had "no significant managerial skills" and that Harris inserted T & M into transactions as a way to give Schwentker money.

The government theorized that Harris "operated through a maze of shell corporations and 'trusts' that he controlled through nominee officers, directors, and owners who were loyal to him." It alleged that this arrangement enabled Harris to keep his name out of the public record and obscure his role in the ventures that generated his wealth.

The government asserted that Harris created sham trusts with the help of Douglas Carpa, a "promoter of abusive offshore 'trusts' and 'untaxing' packages." IRS accountant Fisher testified that Harris's use of such entities created confusion about who was earning income, what tax

rate applied, and whether payments were loans, capital contributions, or taxable events.

It also contended that Harris had accounts with Natural Coin Exchange ("NCE"), a warehouse bank operated by the anti-tax Christian Patriot Association ("CPA"). Fisher testified that Harris's use of the NCE broke up the audit trail.

The government further alleged that some Harris entities maintained inadequate records and did not file federal tax returns during the relevant period, and that Harris did not file federal returns. It introduced evidence that, from 1995-2000, Harris's companies grossed $1.8 million in oil and gas receipts and rent which they never reported. The government showed that Harris failed to report $800,000 obtained from a GH amusement park in 1998.

Fisher testified that, although he was unable to calculate exactly how much tax Harris evaded from 1997-2000, he was able to identify unreported income items that Harris earned during that period and calculate the taxes due: (1) for 1997, over $375,000 in unreported income, yielding $106,120 due; (2) for 1998, over $115,000, yielding $33,487 due; and (3) for 1999, over $163,000, yielding $51,300 due. Because Fisher lacked a reliable audit trail, he did not include income that Harris apparently earned from oil and gas operations and the amusement park.

Kotula allegedly schemed to create the appearance that his sale of land to Ashtabula County, Ohio, qualified for deferred taxation because it occurred under threat of eminent domain. County officials testified that they never intended

to use eminent domain and that the contract's references to eminent domain were inserted at Kotula's behest.

In 1996, a federal grand jury charged Harris with tax and RICO offenses. *US v. Harris,* No. 1:96CR122 (N.D.Ohio). In 1997, Harris accepted a plea that required him to disclose financial information, pay $300,000 to settle federal tax obligations for 1990 and earlier, and file returns or accept IRS-prepared substitute returns for 1991-1996 and pay the liabilities determined for those years ("the 1997 plea"). The 1997 plea provided, in part,

> ¶ 6(b): The United States Attorney for the Northern District of Ohio will not bring any other criminal charges against the defendant with respect to conduct alleged in the superseding indictment or other conduct known to [him], as of the date of the execution of this agreement, except as provided in paragraph 6(c) below. This promise is not binding on any other federal, state, or local governmental entity.
>
> ¶ 6(c): If the defendant files income tax returns for the years 1991 through 1996 as provided above in paragraph 5(g)(1), the United States agrees that it will not prosecute him under 26 U.S.C. § 7203 for his prior failure to file such returns and will not use those returns or information in those returns, directly or indirectly, as evidence to prosecute him for any offense of attempting to evade taxes under 26 U.S.C. § 7201 committed prior to the filing of the returns. The defendant understands, however, that if he willfully falsifies any such return, the United States

> will be free to prosecute him for violations of § § 7201, 7206, or other criminal provisions of Title 26 with respect to that tax year....

The district court sentenced Harris to an agreed-upon four years in prison, which he began serving in August 1998.

In July 2003 a federal grand jury in Northern Ohio returned a five-count indictment. Count one charged all defendants with conspiracy to defraud the IRS and to commit substantive tax offenses, in violation of 18 U.S.C. § 371. Counts two through four charged Harris with evading taxes and failing to file returns for 1996-1999, in violation of 26 U.S.C. § 7201. Count five charged Kotula with tax evasion for 1998. Schwentker was not charged with any substantive offense.

Harris moved to dismiss the indictment, contending that it violated his 1997 plea by charging him with offenses related to 1994-1996; he also moved to strike references to overt acts allegedly occurring in 1994-1996. The district court denied the motions in November 2003.

After hearing argument regarding whether the prior plea was relevant to the element of willfulness in these offenses, the district court prohibited Harris from raising the issue at trial of whether the indictment covered conduct which the 1997 plea obligated the government not to prosecute. The district court ruled, however, that jurors could consider whether Harris believed he had satisfied his tax obligations for 1991-1996 by paying the amounts called for by IRS substitute returns; Harris's possible belief that he had paid all 1991-1996 taxes could bear on whether he had

the intent required by count one, conspiracy to defraud.

At trial, the district court let Harris raise the prior plea (1) in his opening statement and (2) while cross-examining the government's first witness. The court, however, disallowed his attempt to cross-examine another IRS witness about the prior plea and his attempt to call the lawyers who negotiated it.

Harris asked for a good faith instruction under *Cheek v. United States*, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991). Harris adduced the 2001 prosecutor's letter that he characterizes as stating that his 1991-1996 tax debts had been satisfied. The district court refused the instruction.

A jury found defendants guilty on all charges in February 2004, and the district court denied Harris's motion for judgment of acquittal. The court sentenced Harris to 151 months in prison, Kotula to 60 months, and Schwentker to 15 months. Because of *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the court announced alternate sentences that it would impose if the Guidelines were found to be unconstitutional: ninety-six months in prison for Harris, forty-eight months for Kotula, and no imprisonment and two years probation for Schwentker.

II.

First, on appeal, Harris argues that the instant prosecution was barred by his prior plea agreement:

[A]fter Harris's release from prison, the same U.S.

> Attorney's Office prosecuted him again. The first count of the indictment ... charged a wide-ranging conspiracy ... between January 1994 and "the date of this Indictment." (... June 8, 2003....) The focus of the indictment was on tax-related conduct from 1994 through mid-1997, conduct prior to the plea bargain of November 3, 1997 (Overt Acts 21-107), and for tax filing failures while Harris was imprisoned.... In effect, the government claimed that it had planted a gigantic loophole in the 1997 agreement and could prosecute Harris notwithstanding [his] reasonable understanding of that deal.

Harris contends that the court should have exercised its equitable power to restore him to the position he would have been in had the government honored its nonprosecution promise. At this point, Harris argues,***479** the remedy is *vacatur* of his convictions and a new trial.

A plea agreement is a contract, *US v. Jones,* 417 F.3d 547, 549 n. 1 (6th Cir.2005), and, in interpreting such an agreement, we apply traditional contract law principles. *Smith v. Stegall,* 385 F.3d 993, 999 (6th Cir.2004), *cert. denied,* 544 U.S. 1052, 125 S.Ct. 2299, 161 L.Ed.2d 1094 (2005). "[P]rimary importance should be placed upon the words of the contract. Unless expressed in some way in the writing, the actual intent of the parties is ineffective, except when it can be made the basis for reformation of the contract." *Id.* Consistent with this principle, the government is held to the literal terms of the writing. *Id.* "Where a defendant fulfills his promise[s] in entering a guilty plea, the prosecution is bound to fulfill any promise made in exchange." *US v. Garcia-Meza,* 315 F.3d 683, 686 (6th

Cir.2003).

The content of a plea is a factual issue that we review for clear error, *US v. Lukse,* 286 F.3d 906, 909 (6th Cir.2002), but whether a party violated a plea agreement is a legal issue that we review de novo. *US v. Fitch,* 282 F.3d 364, 366 (6th Cir.2002).

As noted above, ¶ 6(b) of Harris's 1997 plea provided that the U.S. Attorney "will not bring any other criminal charges against the defendant with respect to conduct alleged in the superseding indictment or other conduct known to [him], as of the date of the execution of this agreement, except as provided in paragraph 6(c)...."

In turn, ¶ 6(c) provided that if Harris "files income tax returns for the years 1991 through 1996 as provided above in paragraph 5(g)(1), the United States ... will not prosecute him under 26 U.S.C. § 7203 for his prior failure to file such returns and will not use those returns or information in those returns, directly or indirectly, as evidence to prosecute him for any offense of attempting to evade taxes under 26 U.S.C. § 7201 committed prior to the filing of the returns." But ¶ 6(c) cautioned that if Harris "willfully falsifies any such return, the United States will be free to prosecute him for violations of § § 7201, 7206, or other criminal provisions of Title 26 with respect to that tax year, and may use the return as evidence in any such prosecution."

Paragraph 6(c)'s "any such return" refers to the prior sentence's "income tax returns for the years 1991 through 1996 as provided above in paragraph 5(g)(1)." In turn, 5(g)(1) provides: "The defendant will, prior to the date of

sentencing, either (1) file personal income tax returns for the years 1991 through 1996 ... or (2) ... submit proof ... that the IRS has prepared substitute returns on his behalf for those years...." It is undisputed that Harris never filed federal tax returns for any of the years 1991-1996, as he could have done under ¶ 5(g)(1). Instead, Harris relied on and accepted the substitute returns prepared by the IRS for those years, the option allowed by ¶ 5(g)(2).

Thus we agree with Harris that he never filed any 1991-1996 returns "as provided in ... paragraph 5(g)(1)." That means that Harris cannot have "willfully falsified" any return filed "as provided in ... paragraph 5(g)(1)." This is significant, because Harris's willful falsifications of 1991-1996 returns *that he prepared and filed* was the only situation that the prior plea expressly states will relieve the government of its promise not to prosecute. Therefore, we conclude that the only express exception to the government's nonprosecution promise was not satisfied.

So far we agree with Harris, but no farther. There are *three* situations in which the government could be relieved of its 1997 plea agreement non-prosecution promise: (1) when the defendant's conduct triggers a plea provision expressly stating that the duty not to prosecute is obviated by such conduct, such as ¶ 6(c) of Harris's prior plea; *or* (2) when the defendant violates some other provision of the plea, thereby obviating the government's duty to abide by the agreement at all; *or* (3) when the defendant breaches the duty of good faith and fair dealing that is implied on both parties in every plea agreement.

As discussed above, Harris is correct that the first of

these three situations does not apply here. The district court erred in ruling that Harris violated ¶ 6(c) of the prior plea. But Harris's own breach of his promises in the prior plea relieves the government of its duties thereunder. *US v. Wells*, 211 F.3d 988, 995 (6th Cir.2000) ("[A] defendant who breaches a plea agreement forfeits any right to its enforcement."). Harris breached ¶ 5(f), which required him to give the U.S. Attorney "a complete and accurate financial statement, on government form OBD-500." Harris failed to comply with OBD-500's line 30, which directed him to disclose all transfers of property worth at least $300 in the three years prior to executing the form (July 7, 1998).

The government identifies three transfers Harris was obligated to list on the OBD-500 but did not: (1) 1995, when he caused Austinburg Corp. to sell land and had the title company give $25,000 of the proceeds to T & M; (2) 1995, when he sold the assets of Sharp & Fellows and deposited $450,000 into his warehouse bank account; and (3) 1997, when he established a non-profit corporation and gave it the assets of the GH amusement park.

Harris does not dispute that the plea obligated him to provide a complete financial statement on Form OBD-500, and that the form instructed him to list all transactions over $300 within the preceding three years. Nor does Harris deny that he caused or authorized the three omitted transactions. Nor does he dispute that each of these three transactions was worth over $300 and occurred during the three years preceding his execution of the form. Therefore, we conclude that Harris breached his plea obligation to provide a complete and accurate financial statement on OBD-500.

That breach relieves the government of its duties under the prior plea. Paragraph 5(j) provides that "[t]he defendant understands that if he breaches any of his promises ... the government will be released from all of its obligations...." Similarly, at common law "a defendant who breaches a plea agreement forfeits any right to its enforcement." *Wells*, 211 F.3d at 995.

This was not the ground on which the district court ruled that Harris breached. However, it is well-settled that we may affirm for reasons other than those stated by a lower court. *US v. Boumelhem*, 339 F.3d 414, 428 (6th Cir.2003). We may disregard an alternative argument in support of a lower court's decision if the appellee failed to present that argument below, *id.*, but we have discretion to consider the argument as well. We do so here because the argument that Harris breached ¶ 5(f) of the plea is not fact-intensive (Harris does not dispute the underlying facts) and the record is sufficiently developed to rule on it. *Rakity v. Dillon Cos.*, 302 F.3d 1152, 1166 n. 4 (10th Cir.2002) ("We are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court.").

Harris asserts that "[t]he completely factual nature of the claim that Mr. Harris's OBD-500 was intentionally and materially incomplete is self evident." Yet he does not dispute that the plea obligated him to provide a complete statement on OBD-500, which instructed him to list all transactions over $300 within the past three years. He does not claim that he was confused by the form's instructions. Nor does Harris dispute that when he filed the form, he knew

these omitted transactions were worth over $300 and occurred during the past three years. Therefore, we conclude that Harris breached his plea obligation to provide a complete OBD-500 financial statement.

Harris cites *Pembaur v. City of Cincinnati,* 882 F.2d 1101, 1107 (6th Cir.1989), for the proposition that "when 'there is no indication in the record that this issue was raised before the district court,' affirmance on an alternate ground that is not a pure question of law is inappropriate." But *Pembaur* did not announce any such rule that only purely legal questions may be considered on appeal if not raised below. *Pembaur* dealt with a rather different situation:

> The County alleges an alternative ground for reversing the district court's decision.... The County argues that *Steagald v. United States,* 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 [U.S.1981], decided four years after the incident involved in this case, should not have been applied retroactively to provide a basis for compensation for a violation of the fourth amendment.
>
> * * *
>
> [T]he retroactive application of *Steagald* would be an intriguing legal issue. * * *
>
> However, Pembaur argues that we are precluded from reversing the district court's decision on these grounds, and we must agree. When the Supreme Court considered this case previously, the ... retroactivity of *Steagald* was addressed....
>
> [T]he [Supreme] Court is in the best position to

> determine the import of concessions and arguments made in open court before it. We thus believe it the more prudent course to hold that this issue was conceded before the Supreme Court, at least until that Court speaks more clearly.
>
> Since the Supreme Court has determined that the concession occurred, the County may not now attempt to undo the concession. In general, when an official litigant fails to raise a challenge timely, or concedes an issue, it cannot be raised for the first time this late in the proceedings.

Pembaur, 882 F.2d at 1105-06.

Moreover, Harris provides no authority holding that materiality in this or any other context is a purely or predominantly factual issue. On the contrary, precedent leads us to conclude that whether Harris's omission of the transactions represented "material" incompleteness is at most a mixed legal/factual question. *See US ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 446 (6th Cir.) (whether false statements were "material" to a false claim to receive money from the government "is a mixed question of law and fact which we review de novo") (citations omitted), *cert. denied sub nom. Winters v. US ex rel. A+ Homecare, Inc.*, --- U.S. ----, 126 S.Ct. 797, 163 L.Ed.2d 630 (2005); *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 449 (6th Cir.2002) (whether ERISA fiduciary's misrepresentation was material is a mixed question of law and fact); *Hammer v. INS*, 195 F.3d 836, 841-42 (6th Cir.1999) ("The key legal question ... was whether Hammer had procured his citizenship through the

concealment of a material fact...."); *US v. Latouf,* 132 F.3d 320, 330 (6th Cir.1997) (in perjury prosecution, materiality was a mixed question of law and fact) (citation omitted).

Harris fails to show how these three transactions could be deemed "not material" when the OBD-500 instructions clearly required him to list *all* transactions worth over $300 that took place within the preceding three years. *Cf. Johnson v. US,* 520 U.S. 461, 470, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (evidence that misrepresentation was material was "overwhelming" where the defendant presented no plausible argument that her lying about the source of tens of thousands of dollars which she had used to improve her home was not material to the grand jury investigation, which in part concerned whether the defendant's boyfriend had concealed his drug proceeds as real estate investments).

The government also contends that Harris breached his implied promise of good faith by knowingly providing false information on which the IRS relied in preparing substitute returns. We need not consider this argument; the government is already released from its plea obligations by Harris's breach of his ¶ 5(f) promise to provide the information required by OBD-500.

III.

Next, Harris and Schwentker contend that their convictions should be reversed because the district court erred in admitting testimony by IRS agent Koritala.[1] They

[1] Pursuant to Fed. R.App. P. 28(I), Harris adopts Schwentker's arguments against the admission of agent Koritala's Carpa

object to Koritala's testimony that discussed (1) the investigation and prosecution of alleged "abusive shelter promoter" Douglas Carpa in 1992, and (2) the contents of taped conversations involving Carpa that were destroyed by the government. For example, Koritala testified on direct examination as follows:

> Q. How do you know Mr. Carpa?
> A. [IRS] received information that Mr. Carpa was preparing untaxing packages ....
>
> ....
>
> Q. And what action did you take to investigate Mr. Carpa?
> A. An undercover investigation was initiated. [O]ur undercover agent, whose name was Jim Climber ... posed as a prospective client for Mr. Carpa....
>
> ....
>
> A. He met with him several times. The main occasion where he spent a long time at his house was in August of 1992.
>
> ....
>
> Q. What did Mr. Carpa tell Special Agent Climber?
> A. Mr. Carpa at the time was at his residence with his first assistant, Joseph Vallencourt. And Mr. Carpa and Mr. Vallencourt explained to Mr. Climber that their other organization had created this series of trust packages wherein a person would no longer have to pay income taxes ... and went on to explain how it worked.
>
> ....

---

testimony. Harris also supplements Schwentker's arguments.

Q. Could you describe the program that Douglas Carpa was referring to?
A. * * * Mr. Carpa ... would ask the person to file amended tax returns or 1040X's and zero out their income and ask for all taxes paid in to be refunded to them.

[A]fter that ... they would ... sign an affidavit saying that they were not a U.S. citizen, that they were [only] a citizen of the state that they lived in....

And after that Mr. Carpa would prepare a series of trusts which he referred to as a wagon wheel type trust, where he would have a wheel of trusts which one would contain your house, one would contain your automobiles, one would contain your bank accounts, one would contain your business, and any other assets. There would be a separate trust. All those trusts would be managed by a management trust and these would all be trusts that were domiciled in the United States. And then there would be a separate trust offshore that would control all these other trusts, and that offshore trust would be controlled by the client.

So Mr. Carpa ... went on to explain that if the IRS ... came to seize the assets or seize your income that was in those trusts, they couldn't do it because they would go from trust to trust to trust and finally get to the offshore trust where there would be no information available. [T]he IRS couldn't take anything ... in those trusts.

....

> Q. Now, did Mr. Carpa mention whether or not these trusts had any applicability towards payment of future income taxes?
> A. He said that ... you wouldn't have to pay income taxes on that income in the future once he untaxed you.
>
> Q. As a result of this information that you learned ... what action did you take next?
> A. We wrote a probable cause statement and a judge issued ... search warrants.... And we executed those search warrants on, I believe, February 25th, 1993.
>
> ....
>
> A. * * * We found hundreds of client files....
>
> ....
>
> Q. What was Mr. Carpa's business called? Did it have a name?
> A. United Asset Management Trust.

After discussing the files found at Carpa's house, the nature of a wagon-wheel trust, and individuals who allegedly worked for Carpa, agent Koritala testified on cross-exam:

> Q. And Mr. Carpa has been in jail since August of 1993, hasn't he?
> A. I believe so.
>
> Q. And he's never been convicted of tax evasion?
> A. Not that I know of.
>
> Q. And in 1994, when Mr. Harris met with him, either they let him out oh [sic] on a furlough or he didn't meet with Mr. Harris, right?

A. I don't know that he met with Mr. Harris.

....

Q. * * * You would agree with me it is harder for [Carpa] to sell his services if he's openly saying, I'm going to make you a felon?
A. I'll agree with that.

....

Q. He [Carpa] tries to create the impression, the aura that these are appropriate trusts created according to the laws of the United States?
A. Yes.

Q. Indeed, on the Asset Management Trust it says created pursuant to U.S. public law?
A. Yes.

Q. And he takes that document and he has it recorded in the recorder's office in the State of Arizona?
A. Yes.

Q. And people accept them as public records?
A. Yes.

Q. And when the client gets it back he sees that a government official has recorded it?
A. Yes.

....

Q. Now, you said the investigation of Mr. Carpa began in August of 1992?
A. Actually, that's when the meeting took place.

Q. I apologize, you are right. It had to start before that otherwise you wouldn't be able to have a meeting

> with the undercover agent. And there was also an IRS search of Gary Harris's property in September of 92. Do you know anything about that?
> A. No.
>
> Q. It would be correct to say that other than the fact that they came about a month apart, there was no relationship between those two events?
> A. I don't know that there was one.
>
> Q. You, as investigating Douglas Carpa, weren't looking at him because of his activities with Mr. Harris, because there weren't any?
> A. I wasn't looking at him. I don't know if there were any or not.
>
> Q. Whe[n] you looked at Mr. Carpa, it wasn't because of what he had done with Mr. Harris?
> A. No.
>
> Q. And so far as you know when they looked at Mr. Harris it wasn't what he had done with Mr. Carpa, because he hadn't done it yet?
> A. Correct.

Immediately after agent Koritala finished testifying, the district court cautioned the jury that his testimony was offered against Harris alone:

> That testimony that you just heard was offered to prove ... Mr. Harris's alleged intent in relation to the creation or use of ... some of the trusts ... referenced as part of this case.

> It has not been offered as against ... Miss Schwentker ... or Mr. Kotula. So the evidence is to be considered by you for that sole purpose.... Again, as to the alleged intent of Mr. Harris in forming these trusts and/or relation to his use of these trusts.

First, Harris and Schwentker contend that the district court erred in admitting the testimony as a co-conspirator statement under Fed.R.Evid. 801(d)(2)(E) because the Carpa conversations occurred years before the instant conspiracy. Harris argues,

> it was not the conspiracy charged in the indictment on which the court relied as a foundation for the admission of this hearsay, but rather a different and undefined conspiracy. The conspiracy identified as a foundation for admission of the hearsay statements was centered on Carpa and his trust-promoting business associates, and consisted, it seems, of the trust promoters and perhaps each of their clients, to assist those clients in evading taxes. The indictment conspiracy was among Harris and his associates to defraud the U.S. and evade Harris's tax obligations.
>
> ....
>
> At the time the statements were made, Mr. Harris was not a Carpa client ..., so the statements were not made "during and in furtherance of" any conspiracy which could conceivably have existed at some later time between Carpa and Harris to evade Harris's taxes. Nor did the government ever prove that Harris knowingly joined whatever conspiracy it was which Carpa's 1992 statements were made to further.

> Rather, as the Supreme Court explained in ... *Kotteakos v. United States,* 328 U.S. 750 [66 S.Ct. 1239, 90 L.Ed. 1557] (1946), when a central figure has criminal dealings with multiple clients, those *clients* are not necessarily all in a single conspiracy with one another, unless the facts show them to be interdependent and part of a common enterprise. Thus, a conspiracy between a central figure and one client is not the same agreement as that which may exist between that same central figure and another client.... Harris *never* became a member of the promoters' conspiracy; instead, he later became its customer.

Harris reasons that Koritala's Carpa testimony was unfairly prejudicial because it "tied Harris to a broad web of tax evasion, involving multiple off-shore trusts, run by a central figure [Carpa] who had been imprisoned since 1993 (i.e., for over ten years, obviously on very serious charges)." Harris asserts that the prejudice was compounded by the admission of agent Walker's testimony about the CPA, which operated the warehouse bank. Harris says that Walker's testimony consisted of summaries of the investigation to a degree that exceeds permissible "background" and violates the personal-knowledge requirement of Fed.R.Evid. 602.

Second, Harris and Schwentker contend that Koritala's Carpa testimony violated their constitutional right of confrontation because there was no showing that Carpa was unavailable and they never had a chance to cross-examine Carpa. The government did not call Carpa as a witness, even though he was a federal prisoner and so readily

available.

Third, Harris and Schwentker contend that Koritala's testimony about Carpa should have been excluded under Fed.R.Evid. 403 as substantially more prejudicial than probative. Koritala testified about defendants' relationship to certain trusts, but "the government admitted that it had no evidence that 'anyone other than Mr. Harris had a relationship with these trusts.' "

Harris and Schwentker emphasize that, because the government destroyed the Carpa tapes, they could not rebut agent Koritala's testimony or test the accuracy of his recollection of the Carpa conversations. In sum, they contend that the introduction of Koritala's Carpa testimony severely prejudiced them and likely influenced the verdict against them.

Hearsay is a statement, other than one made by the declarant at trial, offered in evidence to prove the truth of the matter asserted, Fed.R.Evid. 801(c), and it is presumptively inadmissible, Fed.R.Evid. 802. However, certain statements which would be hearsay are simply defined as not hearsay. A statement is not hearsay if "[t]he statement is offered against a party and is ... (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish ... the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered...." Fed.R.Evid. 801(d)(2).

The proponent of hearsay must prove that it "fits

squarely within a hearsay exception or exclusion." *US v. Kendrick,* 853 F.2d 492, 496 n. 3 (6th Cir.1988). To render Carpa's statements admissible under Fed.R.Evid. 801(d)(2)(E), the government had to show that (1) a conspiracy existed that included Carpa and Harris, and (2) Carpa's statements were made in the course of and in furtherance of the same. *US v. Moss,* 9 F.3d 543, 548-49 (6th Cir.1993). The government must submit non-hearsay evidence-evidence beyond the declarant's statements-to corroborate these contentions. *US v. Payne,* 437 F.3d 540, 544 (6th Cir.), *cert. denied,* --- U.S. ----, 126 S.Ct. 2909, 165 L.Ed.2d 937 (2006). In the present case, the district court never found that the government showed that Carpa made the statements in the course of a conspiracy *of which Harris was a member,* and the government did not meet that burden. Even now, the government does not claim that Harris was a member of the conspiracy which Carpa was trying to further with the contested statements. Accordingly, if the government introduced Carpa's statements to prove the truth of the matters asserted, the statements would be hearsay and it would be an abuse of discretion to admit them under the coconspirator exclusion.

But the government introduced Carpa's statements for a purpose other than proving the truth of the matters asserted. Namely,

> [t]he Carpa statements were important ... for the fact that Carpa was saying them and that in contracting with the statement maker's organization, defendant demonstrated an anti-tax animus. The government successfully connected Harris with an organization espousing aggressive tax-protestor conduct. His use

> of the organization's services in his scheme strongly manifested his intent to defeat his obligations under the tax laws, regardless of whether the organization's representations were true.

For example, in *US v. Wilson,* 532 F.2d 641 (8th Cir.1976), notebooks found in a "heroin house" tended to corroborate the government's version of defendants' drug activities. In response to defendants' contention that the notebooks were hearsay, the court stated:

> we view the declarations in the notebooks as utterances, *used circumstantially,* giving rise to the indirect inference that the apartment was the scene of drug sales and drug related activity. Furthermore ... *the existence of the notebooks and the fact of these entries* served to corroborate [a government witness's testimony]. It is the fact that the statements were written, and not the truth of the statements, which was relevant.

Id. at 646 (citations & nn. omitted).

The government properly introduced such evidence because a jury may consider a defendant's tax-protestor activities and anti-tax animus as bearing on whether his noncompliance with the tax laws was willful. *US v. Grosshans,* 821 F.2d 1247, 1253 (6th Cir.1987). Introduced for this purpose, the Carpa statements were not hearsay. Thus, the government had no burden to show that the statements qualified for an exception to the rule prohibiting hearsay.

Nonetheless, the fact that Carpa's statements were admissible as nonhearsay does not change the fact that they were admitted on a different and wrong basis (as coconspirator statements). Because the district court erroneously ruled that Carpa's statements were hearsay, it had no occasion to instruct the jury to consider the statements only for their non-hearsay purpose.

Absent such a limiting instruction, we cannot be confident that the jury considered the statements only for the permissible purpose. *Cf. US v. Perry,* 438 F.3d 642, 648-49 (6th Cir.) (although district court did not abuse discretion in finding that evidence was not substantially more prejudicial than probative under Rule 403, "the court should nonetheless issue a limiting instruction establishing the basis for the inclusion of the Rule 404(b) evidence"), *cert. denied,* --- U.S. ----, 126 S.Ct. 2045, 164 L.Ed.2d 799 (2006).

The Supreme Court encountered a somewhat similar situation in *Shepard v. US,* stating:

> Here the course of the trial put the defendant off his guard. The testimony was received by the trial judge and offered by the Government with the plain understanding that it was to be used for an illegitimate purpose, gravely prejudicial. A trial becomes unfair if testimony thus accepted may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected. Such at all events is the result when the purpose in reserve is so obscure and artificial that it would be unlikely to occur to the minds of uninstructed jurors, and even if it did, would be swallowed up and lost in the one that

was disclosed.

290 U.S. 96, 103, 54 S.Ct. 22, 78 L.Ed. 196 (1933), *quoted in US v. Williams,* 837 F.2d 1009, 1012-13 (11th Cir.1988).

The Supreme Court's *Shepard* decision, however,

> does not necessarily prohibit the courts of appeals from affirming the admission of evidence on grounds not advanced below under all circumstances. As the above-quoted *Shepard* excerpt indicates, the basic unfairness in that case derived from the government's attempt to justify the admission of Mrs. Shepard's statement on a theory wholly unrelated to the ground advanced at trial.
>
> The Second and Third Circuits have held that the *Shepard* rationale does not apply when the evidentiary grounds relied on by the government at trial and on appeal serve the same purpose. In *United States v. Rosenstein,* 474 F.2d 705 (2d Cir.1973), the government introduced documents at trial under the business-records exception to the hearsay rule. The Second Circuit concluded that the documents were not properly admitted under that exception.... Nonetheless, the Second Circuit held that the documents could have been admitted as admissions of the defendant. *Shepard* did not require reversal, for both justifications for the admission of the documents served the same purpose, namely the establishment of the truth of the matter asserted. The basic unfairness in *Shepard*, where the government advanced on appeal a theory wholly unlike the one

> presented to the trial court, was therefore not present in *Rosenstein.*

Williams, 837 F.2d at 1013.

Here, as in *Shepard*, the government advances on appeal a theory for the admission of Carpa's statements (verbal acts that are not hearsay) that is wholly unlike the one considered by the district court (coconspirator statements excepted from the hearsay rule). The two grounds for admission do *not* serve the same purpose; the coconspirator exception allows statements to be introduced as proof of the matters asserted, while the verbal-acts doctrine does not. *See, e.g., Preferred Props., Inc. v. Indian River Estates, Inc.,* 276 F.3d 790, 798 n. 5 (6th Cir.2002). Therefore, the admission of Koritala's Carpa testimony statements was error of the sort condemned in *Shepard.*

The question is whether this error warrants vacatur of Harris's convictions. We may treat the failure to give a limiting instruction regarding Koritala's Carpa testimony as harmless error if "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *US v. Baldwin,* 418 F.3d 575, 582 (6th Cir.2005) (citation omitted). We hold that the error was harmless here because there was "overwhelming evidence of guilt beyond the erroneously admitted testimony." *Id.* We note that Harris has not challenged the sufficiency of the evidence.

Harris also contends that the admission of Koritala's Carpa testimony violated his Sixth Amendment right to confront the witnesses against him. To evaluate this argument, we first note the difference between testimonial

and non-testimonial statements. *See Davis v. Washington,* 547 U.S. ----, 126 S.Ct. 2266, 165 L.Ed.2d 224, 236-37 (2006). Previously, the Supreme Court declined to comprehensively define "testimonial," but testimonial statements include "at a minimum ... prior testimony at a preliminary hearing, before a grand jury, or at a former trial; [and] police interrogations." *Crawford v. Washington,* 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.*

But we need not decide whether Carpa's statements were testimonial. They would not implicate the Confrontation Clause even if they were:

> The admission of a testimonial statement in and of itself is not enough to trigger a violation of the Confrontation Clause. Instead, the statement must be used as hearsay. [T]he Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.

US v. Pugh, 405 F.3d 390, 399 (6th Cir.2005) (quoting *US v. Cromer,* 389 F.3d 662, 676 (6th Cir.2004)). As discussed above, Carpa's statements were not used as hearsay, so their admission (through Koritala's testimony) does not implicate the Confrontation Clause. *Cromer,* 389 F.3d at 676 ("Any out-of-court statements ... explain[ed] how certain events came to pass or why the officers took the actions they did. Because the statements were not offered to establish the truth

of the matter asserted, the Confrontation Clause does not apply."); *accord US v. Hansen,* 434 F.3d 92, 100 (1st Cir.), *cert. denied,* --- U.S. ----, 127 S.Ct. 203, 166 L.Ed.2d 164 (2006).

That leaves the question of the probative value and prejudicial impact of Carpa's statements. In this case, however, the district court did not perform the correct Rule 403 analysis. The district court considered the probative value and prejudicial impact of the Carpa statements *when introduced to prove their truth.* But it did not consider the value and impact of the Carpa statements *when introduced for the non-hearsay purpose of showing that Harris was a client of someone who made statements suggesting an intent to help clients evade taxes.*

Therefore, Harris contends, the case must be remanded for the district court to make this Rule 403 determination. We disagree. Under the circumstances, the interest in judicial economy, combined with the fact that this is not a close question, lead us to conduct the Rule 403 balancing. *See US v. Schiff,* 612 F.2d 73, 80 (2d Cir.1979) ("[W]e have viewed the evidence ... with our own eyes, and can judge the likely prejudice resulting from it as well as the trial judge."); *cf. US v. Sriyuth,* 98 F.3d 739, 748 n. 15 (3d Cir.1996) ("[W]e must make this determination in the first instance as the district court record is devoid of any references to a Rule 403 analysis.").

When conducting a Rule 403 balancing, we view the evidence in the light most favorable to the prosecution, maximizing the probative value of the evidence and minimizing its potential prejudice to the defendant. *US v.*

Logan, 250 F.3d 350, 368 (6th Cir.2001). "Moreover, the prejudice to be weighed is the *unfair* prejudice caused by admission of the evidence. Evidence that is prejudicial only in the sense that it paints the defendant in a bad light is not unfairly prejudicial...." *US v. Sanders*, 95 F.3d 449, 453 (6th Cir.1996).

As discussed above, agent Koritala's Carpa testimony was highly probative of Harris's state of mind. The Carpa statements were important for the very fact that Carpa was saying them and that, in contracting with the organization, Harris demonstrated an anti-tax animus and perhaps a desire to enlist the warehouse bank's aid in evading taxes. The First Amendment recognizes Harris's natural right to express anti-tax sentiments, but it does not prevent a reasonable jury from inferring intent to evade in part from Harris's association with tax-protesting and arguably tax-evading persons (Carpa) and organizations (CPA) and his use of their services, which were touted precisely for their utility in thwarting tax investigations. Conversely, there was a risk that the jury would impermissibly reason that, because Harris associated with tax evaders, he must be an evader too.

On balance, we conclude that the significant probative value of Koritala's Carpa testimony was not "substantially outweighed" by the risk of "unfair" prejudice to Harris or his codefendants.

IV.

Harris also contends that agent Walker's testimony summarizing the investigation should have been excluded because Walker had no personal knowledge of the events he

described: "That this Court has approved carefully limited presentations of 'background' evidence, *see US v. Hardy*, 228 F.3d 745, 748 (6th Cir.2000), does not authorize wholesale disregard of the personal knowledge requirement under the Rules."

Harris points to four offending statements by agent Walker as examples: (1) "during the investigation we found this organization [CPA] was created to-was an anti-tax organization that its whole purpose is to help its client vanish from the system"; (2) "[t]hey wanted to make sure that it was very difficult for the IRS and any other government entity to come in and identify their clients"; (3) "[w]hat they did here was to eliminate paper and try to eliminate a paper trail, as they always say"; and (4) when CPA literature cited "our right to associate, to redress the government under the First Amendment", the CPA actually meant that "they are not going to cooperate with the Internal Revenue Service. In the event they get like a summons or levy ..., they will not respond, or they will respond with no money available."

Harris reasons that, because the government presented evidence that he has accounts at the CPA bank, he was prejudiced by Walker's testimony describing the CPA pejoratively.

Federal Rule of Evidence 602 provides,

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule

> is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

Personal knowledge may be proved by the witness's own testimony, but he "must still set forth a factual basis for his claim of personal knowledge...." *Hilgraeve, Inc. v. Symantec Corp.*, 271 F.Supp.2d 964, 974 (E.D.Mich.2003) (citing *Davis v. City of Chicago*, 841 F.2d 186, 189 (7th Cir.1988)).

Nonetheless, the threshold for admitting testimony under Rule 602 is low. *US v. Franklin*, 415 F.3d 537, 549 (6th Cir.2005). Testimony should not be excluded for lack of personal knowledge "unless no reasonable juror could believe that the witness had the ability and opportunity to perceive the event that he testifies about." *Id.*

If Harris had lodged a sufficient Rule 602 objection to agent Walker's testimony, we would review the decision not to exclude the testimony under Rule 602 only for abuse of discretion. *Tisdale v. Fed. Express Corp.*, 415 F.3d 516, 535-36 (6th Cir.2005).

But Harris did not make a specific Rule 602 objection to Walker's testimony. Before Walker testified, the government explained to the district court that Walker's testimony would be based on documentary evidence linking Harris to the warehouse bank that was seized during a search of CPA offices. The government further explained that Walker would testify about a CPA brochure seized during a search of Harris's storage facility. Walker would testify about the nature of the CPA based on his familiarity with the group. Harris's counsel stated only that he would object if Walker were to "go on about the organization itself." The

court let Walker testify and stated that, if any issue arose "with regard to purported co-conspirator statements or anything of that nature," it would "deal with it separately." As the government points out, Harris's counsel never objected to or moved to strike any specific testimony of Walker.

Accordingly, we review the admission of agent Walker's testimony for plain error only. To establish plain error, Harris must show that an error (1) occurred, (2) was plain, i.e. obvious or clear, (3) affected his substantial rights, and (4) seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *US v. Abboud,* 438 F.3d 554, 583 (6th Cir.2006), *pet. cert. filed,* 75 U.S.L.W. 3106 (U.S. Sept. 7, 2006) (No. 06-348).

Even if Walker lacked sufficient personal knowledge to testify to the matters he discussed., it was not *plain* error to admit his testimony because it did not affect Harris's substantial rights.

In this regard, Walker's testimony about the CPA's philosophy and the purpose of its warehouse bank (helping clients vanish from the tax system, concealing their identities, eliminating paper trails that could aid IRS investigation) merely covered the same ground as a CPA brochure that was found in Harris's briefcase and admitted into evidence without objection. The CPA brochure touted the merits of the NCE warehouse bank as follows:

> If you have control over the name of the payee who appears upon your checks and money orders, the ideal way to drop out of sight economically is to have

> the checks and money orders made payable to NCE, CPA instead of yourself or your business. This eliminates completely the paper trail which normally follows you around via the Federal Reserve Banking System....
>
> The Exchange will pay bills for you at your direction.... No method of payment establishes a paper trail which is traceable back to you.

Even without Walker's testimony regarding the CPA and its bank, the government introduced ample other evidence tending to show that the bank was designed to evade taxes, and that Harris had dealings with the bank. *See US v. Brannon,* No. 92-5002, 974 F.2d 1339, 1992 WL 217436, at *1 (6th Cir. Sept. 8, 1992) (even if the DEA agent lacked personal knowledge of the events he described from surveillance of the suspected meth lab, admission of testimony was harmless because there was ample other evidence that defendant went to the warehouse that day and was guilty of the charged offenses).

V.

Next, Harris claims that the jury instructions on good faith and willfulness were erroneous and warrant a new trial. We disagree.

In federal criminal tax cases, the government must prove that the defendant acted willfully. *US v. Cockett,* 330 F.3d 706, 712 (6th Cir.2003) (citing *Cheek v. US,* 498 U.S. 192, 200, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991)). Due to the complexity of federal tax law, a person may not be

convicted for failing to adhere to a tax law unless he was aware of the law and consciously disregarded it. *Cheek*, 498 U.S. at 199-200, 111 S.Ct. 604.

The Supreme Court rejects the notion that a good-faith misunderstanding of the law or a good-faith belief that one is not violating the law must be objectively reasonable if it is to negate willfulness. *Id.* at 201, 111 S.Ct. 604. If a defendant believed in good faith that he was not violating the tax law, he cannot be convicted of any crime requiring willfulness or intent, even if his belief was unreasonable. The trier of fact (here, the jury) determines whether a defendant held such a good-faith belief. *Id.* at 203, 111 S.Ct. 604.

Harris contends that "[t]he Court's minimal instructions[2] on specific intent did not cover the issue

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[2] At the close of trial, the district court instructed the jury, in pertinent part:

For you to find any one of the defendants guilty of the conspiracy charge, the government must prove each and every one of the following elements beyond a reasonable doubt:

....

[On count one, 18 U.S.C. § 371] What the government must prove is that a defendant knew the conspiracy's main purpose, and that he or she voluntarily joined it intending to help advance or achieve its goals. This is essential.

....

The phrase "attempts in any manner to evade or defeat any tax" involves two things.

First, the formation of an intent to evade or defeat a tax; and second, willfully performing some act to accomplish the intent to evade or defeat that tax.

....

In order to sustain its burden of proof for the crimes of

adequately, in light of the special meaning given ... to the willfulness requirement in criminal tax cases." Harris elaborates,

> The indictment charged ... Harris with an ongoing conspiracy ... to evade both assessment and collection of his federal income taxes, including taxes due for 1994, 1995 and 1996. He based his defense at trial, in this respect, on the issue of "good faith"-an honest belief that he had resolved his tax liabilities for those years. If so, his conduct could not have been

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attempted income tax evasion as charged in Counts 1, 2-I'm sorry, Counts 2, 3, 4 and 5 of the indictment, the government must prove beyond a reasonable doubt that Defendant Gary Harris ... acted willfully.

To act willfully means to act voluntarily and deliberately and intending to violate a known legal duty. Negligent conduct is not sufficient to constitute willfulness.

....

Defendant Gary Harris' position is that the government's contention that there was a conspiracy to evade taxes is simply not supported by the evidence.... Harris believes that there has been no testimony or evidence of any agreement among the defendants to do anything unlawful. As to the issue of intent, Defendant Gary Harris submits that he relied on the plea agreement he made in 1997 with respect to issues involving the years 1994, 1995 and 1996.

....

You have heard some evidence related to Defendant Gary Harris' 1997 plea agreement.... This plea agreement in no way prevents the United States from proceeding with the charges alleged in this indictment. You may, however, consider the facts and circumstances surrounding the plea agreement, financial statement, and income affidavit in evaluating his intent.

> intended to evade or defeat those taxes or to defraud the United States in that regard. Concomitantly, if he engaged in the conduct in good faith, he did not act "willfully" in the sense used in criminal tax law....
>
> In this case, the charge as a whole eviscerated the effectiveness of the court's attempt to instruct on the defense theory with respect to key contested elements and all but eliminated the intent question from the jury's consideration....
>
> In addition, [Schwentker] properly requested that the trial court instruct the jury on the two specific intent elements of the offense of conspiracy under 18 U.S.C. § 371, the intent to agree and the intent to effectuate the charged objectives of the conspiracy. .... In particular, where conspiracy under § 371 is charged in a tax case there is a special knowledge element: the statute does require the government to show that they knew of the liability for taxes.
>
> ....
>
> If properly instructed, the jury could readily have believed (or at least entertained a reasonable doubt whether) Harris believed in good faith that his November 1997 plea had resolved all tax issues prior to that date. The charges that he continued to commit tax evasion for the years 1997, 1998 and 1999 while serving his prison sentence depended on the jury's assessment of Harris's good faith in believing that he could postpone filing his returns for those years.

Similarly, Harris contends that "[t]he overriding problem

with the instructions in this case is their failure to convey that if Harris believed all of his tax problems were resolved by the plea, he could not have conspired to defraud the IRS with respect to those years...."

At the charging conference, Schwentker requested a good-faith instruction, claiming that she believed that the returns she filed were accurate, and Kotula requested such an instruction, claiming that he relied in good faith on Harris's accountants and lawyers.

Harris and Schwentker objected at trial to the jury instructions on *mens rea.* We review a properly preserved objection to a jury instruction by determining "whether the charge, taken as a whole, fairly and adequately submits the issues and applicable law to the jury." *US v. Blood,* 435 F.3d 612, 623 (6th Cir.2006). We may vacate a conviction due to faulty jury instructions only if the instructions, viewed as a whole, "were confusing, misleading, or prejudicial." *Id.* Although an instruction alleged to be faulty on a question of law is reviewed de novo, "the failure to provide a requested jury instruction ... is reviewed for abuse of discretion." *Id.*

A district court must instruct the jury on the defendant's theory of the case " 'if the theory has some support in the evidence and the law,' but not where the instruction is 'based on speculation.' " *Blood,* 435 F.3d at 623 (quoting *US v. Morgan,* 216 F.3d 557, 566 (6th Cir.2000)). We are mindful that "even a facially correct instruction may, in light of record proof, the totality of the jury charges, or other circumstances of the case, be incomplete, misleading, confusing, or otherwise prejudicial." *US v. Carney,* 387 F.3d 436, 448-49 (6th Cir.2004).

Nonetheless, when reviewing a decision not to give a requested instruction, we reverse only if the proposed instruction is correct, is not substantially covered by the charge actually given, "and is so important that failure to give it substantially impairs the defense." *Blood,* 435 F.3d at 623-24.[3]

Significantly, reversal is not warranted whenever reasonable jurors *could have* interpreted the instructions given in a way that led them to convict, even though the jurors found that defendants had a good-faith belief that they were complying with the tax laws. As we explained recently,

> [i]n *Cage [v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990)], the Supreme Court held that the instruction at issue violated the Constitution because a reasonable juror "could have" interpreted the instruction at issue to permit a finding of guilt without proof of guilt beyond a reasonable doubt. Since then, however, in *Estelle v. McGuire,* 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), the Supreme Court clarified that the proper inquiry is not whether the instruction "could have" been unconstitutionally interpreted, but whether there is a *reasonable likelihood* that the jury did so interpret

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[3] An omitted instruction is less likely to warrant reversal than an improper one because an omitted instruction "is not as prejudicial as a misstatement of the law." *US v. Jamieson,* 427 F.3d 394, 414 (6th Cir.2005), *cert. denied,* — U.S. ----, 126 S.Ct. 2909, 165 L.Ed.2d 937 (2006).

it....

Perry, 438 F.3d at 651 (internal citation omitted) (emphasis added).

Harris does not meet the second criterion for reversal due to an omitted jury instruction. We determine that the instruction given substantially covered the substance of the requested good faith instruction. The requested instructions arguably spelled out in more detail and focused the jury's attention more on the rule that good faith can negate willfulness or specific intent. The fact that the given instruction is less detailed or forceful than that requested, however, does not change the fact that the former substantially covered the essential principle.

For example, in *US v. Alston*, 375 F.3d 408 (6th Cir.2004), the court gave lengthy instructions on credibility, including the general directive,

> ask yourself if the witness had any relationship to the government or the defendant, or anything to gain or lose from the case, that might influence the witness's testimony. Ask yourself if the witness had any bias or prejudice or reason for testifying that might cause the witness to lie or to slant their testimony....

Id. at 412. Alston contended that the district court erred by not instructing the jury that it should not view police as more credible due to their status. *Id.* at 411. We rejected Alston's argument, stating,

We believe the above instruction invites jurors to

> think about whether witnesses, such as the officers, may be biased because of their relationship with the government. Ms. Alston's concern that the officers' testimony would be given greater deference because of their status was adequately addressed by this instruction and other jury instructions as a whole, and the district court did not abuse its discretion.

Id. at 412. Likewise here, the instruction given correctly stated the applicable law and it substantially covered the same ground as the proposed instructions did. Indeed, this court recently upheld a very similar instruction on willfulness in a federal tax prosecution:

> Tarwater also argues that the district court erred by not giving a good faith instruction ....
>
> [T]he instructions, viewed as a whole, adequately encompassed his theory of defense. The district court instructed the jury on the specific intent required for a conviction for filing false tax returns by stating:
>
> > The word "wilfully," as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he knew the law prohibited, that is to say, with intent either to disobey or to disregard the law. Negligent conduct is not sufficient to constitute wilfulness.

> The jury's conclusion that Tarwater acted willfully would necessarily negate any possibility of "good faith" in filing false tax returns.

US v. Tarwater, 308 F.3d 494, 509-10 (6th Cir.2002) (citing *US v. Pomponio,* 429 U.S. 10, 12-13, 97 S.Ct. 22, 50 L.Ed.2d 12 (1976) (where the court instructs that "willful" in 26 U.S.C. § 7206 means a "voluntary, intentional violation of a known legal duty ... [a]n additional instruction on good faith [i]s unnecessary.")).

Accordingly, we need not address the other criteria for reversal due to an omitted instruction: whether the proposed instruction correctly stated the law and whether its absence substantially impaired the defense. *See Blood,* 435 F.3d at 623-24.

In sum, the instructions adequately advised the jury of the *mens rea* element. By convicting Harris *et al.* of conspiracy to defraud the IRS (and by convicting Harris and Kotula of tax evasion), the jury necessarily found they did not have a good-faith belief that they were not violating the tax laws. In Harris's case, the jury necessarily found that he did not have a good-faith belief that (1) he did not owe tax for 1994-1996 beyond the amounts paid for those years under the 1997 plea, and (2) incarceration relieved him of the duty to file timely returns for later years. *US v. Iskander,* 407 F.3d 232, 241 (4th Cir.2005) ("[T]he jury found him guilty on Counts ... which state that the defendant 'did willfully attempt to evade and defeat a large part of the income tax due.' In other words, the jury found beyond a reasonable doubt that Iskander did not have a subjective belief, irrational or otherwise, that he was not violating the

law when he took cash ... and did not declare" it).

As discussed above, it was error not to instruct the jury to consider agent Koritala's Carpa testimony only for the non-hearsay purpose (to show that the person whom Harris consulted promoted measures to evade taxes) rather than the hearsay purpose (to show that Carpa actually used such measures with the intent of evading taxes, on behalf of Harris or otherwise). In addition, under Rule 602, it may have been error to admit agent Walker's testimony because he lacked personal knowledge of the investigations which he described. Although each of these errors was harmless, we must consider whether they cumulatively warrant vacatur of Harris's convictions. *US v. Parker,* 997 F.2d 219, 221 (6th Cir.1993). We determine that they do not.

VI.

A.

In regard to his sentence, Harris argues that the district court overstated the amount of tax loss in two respects. First, Harris argues it applied the Guidelines' "default percentage" rule to gross receipts, when the guideline refers to gross income. Harris raised this argument in his sentencing memorandum:

> [M]ost of the transactions generating income [and included on the government's "tax loss" exhibit] involved the sale of real estate which had been purchased by the defendant or one of the entities which he managed. Absolutely no adjustment in the Government's income figure has been made for the

> cost of these properties.... [T]he tax loss [computation] cannot simply ignore the obvious impact [that] real estate's cost basis would have on that matter.

Harris renewed this argument at sentencing.

Second, Harris argues the district court improperly included allegedly unpaid state, local, and FICA taxes, when the government never showed that his nonpayment of those taxes was criminal (as required by this court's interpretation of U.S.S.G. § 1B1.3) and the district court never so found. Harris raised this argument in his sentencing memorandum.

> The government provides no meaningful opposition to the tax-loss arguments, stating only,
>
> We do not agree that the District Court ... erred in calculating ... Harris's tax loss or in applying ... an obstruction enhancement to Harris. But since the District Court conducted the sentencing proceedings below without the benefit of the Supreme Court's guidance in *Booker*, this court should order new sentencing hearings.

The government may have expected us to remand for resentencing under *Booker* and ignore the other assignments of sentencing error. But "[w]hile resentencing is required under *Booker*, we consider the remaining claims because the district court will need to consider the correct Guidelines-recommended sentence ... on remand." *US v. Yagar*, 404 F.3d 967, 970 (6th Cir.2005).

When a defendant is convicted of evasion, willful failure to file or supply information or pay a tax, or for filing a false document, the base offense level is determined by calculating the tax loss under U.S.S.G. § 2T1.1 and consulting the conversion table at § 2T1.4. The guideline instructs:

> (1) If the offense involved tax evasion ..., the tax loss is the total amount of loss that was the object of the offense....
>
> Notes:
> (A) If the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.
>
> ....
>
> (2) If the offense involved failure to file a tax return, the tax loss is the amount of tax that the taxpayer owed and did not pay.
>
> Notes:
> (A) *If the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income* (25% if the taxpayer is a corporation) less any tax withheld or otherwise paid, *unless a more accurate determination of the tax loss can be made.*

U.S.S.G. § 2T1.1(c) (emphasis added). These presumptions

apply unless the parties provide sufficient information for a more accurate assessment of tax loss. *Id.*, App. Note 1.

Note 6 states that, for tax-loss estimates under this guideline, "gross income" has the meaning given by 26 U.S.C. § 61, which includes compensation for services, fees, commissions, benefits, gross income from business, gains from dealings in property, interest, rents, royalties, and dividends.

Harris is correct that the district court erred in using gross receipts rather than gross income in applying § 2T1.1(c). Unless a statute or regulation provides otherwise, gross receipts are not ordinarily understood to be equivalent to gross income. *See, e.g., Colony, Inc. v. CIR,* 357 U.S. 28, 36-37, 78 S.Ct. 1033, 2 L.Ed.2d 1119 (1958) (taxpayer reported gross *receipts* from sale of land but overstated its basis in the land, resulting in an understatement of gross *income); Ohio Periodical Dists., Inc. v. CIR,* 105 F.3d 322, 327 (6th Cir.1997) (Kennedy, J., dissenting) ("26 U.S.C. § 458(e) ... confirms that a taxpayer may exclude from gross *income* ... the gross *receipts* attributable to its qualified sales.") (emphasis added).

At sentencing, the government stated, "This 20 percent figure contemplates the business deductions, the business expenses and certainly there were numerous business expenses in this case. .... But, Your Honor, the point is that that 20 percent figure takes that into consideration." This statement is untenable. When a provision directs the court to use twenty percent of gross *income,* by definition the twenty percent has *not* already "taken into consideration" the taxpayer's expenses. Only by

subtracting expenses from gross receipts can the court arrive at gross income-and it is a percentage of that latter number that must be used in the § 2T1.1 calculation.

The district court did not determine what portion of gross receipts represented gross income. That is error that requires vacatur of Harris's sentence and resentencing with a calculation of tax loss based on a percentage of gross income, not gross receipts. The government must provide a detailed explanation of the expenses it deducted from gross receipts to arrive at its gross *income* figure.

Harris also contends that the district court erred by including unpaid state, local, and FICA taxes in the tax loss. We agree. Harris's sentencing memo contended that these amounts were not charged in the indictment and did not constitute "relevant conduct." He contends that relevant conduct cannot include (1) losses from the violation of non-federal tax law, and (2) losses from conduct not shown to have been criminal (nonpayment of state and local taxes). The latter argument prevails.

U.S.S.G. § 1B1.3(a), Relevant Conduct (Factors that Determine the Guideline Range), provides that, unless otherwise specified, the base offense level shall be determined based on:

> (1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or

> enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
>
> * * *
>
> (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
>
> (4) any other information specified in the applicable guideline.

The Commission's notes to the tax-loss guideline further provide, "In determining the tax loss attributable to the offense *(see* § 1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated." U.S.S.G. § 2T1.1, App. Note 2. The Commission defines a common scheme as two or more offenses "substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi."* U.S.S.G. § 1B1.3, App. N. 9A. It defines a common course of conduct as two or more offenses "sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." *Id.*, App. N. 9B. Moreover, acts or omissions falling within the § 1B1.3 definition are

relevant conduct even if the defendant was not prosecuted-and even if he was acquitted of charges involving those acts or omissions or could no longer be prosecuted due to ***497** the statute of limitations. *US v. Pierce,* 17 F.3d 146, 150 (6th Cir.1994).

This court has held that "a district court may not include conduct in its sentencing calculation pursuant to § 1B1.3(a)(2) unless the conduct at issue amounts to an offense for which a criminal defendant could potentially be incarcerated." *US v. Shafer,* 199 F.3d 826, 831 (6th Cir.1999). *Shafer's* facts provide a useful illustration of how this rule works:

> The relevant conduct at issue in the present case involves Shafer's failure to pay his workers overtime wages for their work on non-government projects in violation of the Fair Labor Standards Act.... * * * [T]he FLSA specifically states that:
>
> * * * No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.
>
> Pursuant to this statute, Shafer could have received a fine if he had actually been charged with and convicted of the FLSA violations. Because Shafer would not have received any prison time had he been criminally prosecuted for the FLSA violations, his failure to pay overtime wages for work on the non-government contracts is conduct that should not have been included in his base offense level....

Shafer, 199 F.3d at 831.

Here, the district court made no finding as to whether Harris's nonpayment of state, local, and FICA taxes "amounts to an offense for which a criminal defendant could potentially be incarcerated," *Shafer*, 199 F.3d at 831, so it erred by including that conduct as relevant conduct for tax-loss purposes. On remand, the district court must decide this issue in the first instance.

B.

The district court enhanced Harris by three offense levels for obstruction of justice because it found that he submitted a false income affidavit on which the IRS relied in preparing substitute returns for the years covered by the 1997 plea. Harris contends that this was error because his submission of the affidavit did not occur "during the investigation, prosecution or sentencing of the instant offense[s] of conviction" as required by U.S.S.G. § 3C1.1. Harris reasons:

> [T]he allegedly "obstructive" behavior was part of the charged offense conduct ... Overt Act 109 in the indictment. Because the conduct for which the district court penalized Harris occurred as part of the *commission* of the offense, and not during the investigation or prosecution of that offense, it did not fit [§ 3C1.1]'s specific limitation.....
>
> Harris filed the affidavit ... in March 1998, between the entry of his guilty plea in the prior prosecution

> and the sentencing in that case, as part of his fulfillment of his obligations under the plea agreement in that matter. If the filing of the "false" affidavit "obstructed" any proceeding ... it was the sentencing in the prior case, not the investigation or prosecution of the instant case.

A § 3C1.1 enhancement is appropriate if the defendant obstructed "the investigation, prosecution or sentencing of the instant offense of conviction." U.S.S.G. § 3C1.1. To see if Harris meets one of these prongs, we consider the time line: Harris entered the prior plea in 1997, submitted the income affidavit in 1998, was indicted on the instant offenses in 2003, and was convicted and sentenced in 2004. It is possible that, by giving the government a false picture of his income, Harris's 1998 affidavit impeded, complicated, or delayed the investigation that led to these charges, which would satisfy the first prong of § 3C1.1. *Cf. Tarwater*, 308 F.3d at 505 ("Tarwater's failure to report sizeable amounts of income was capable of influencing the IRS in the audit of Tarwater's tax returns."). As for § 3C1.1's second prong, Harris's submission of a false affidavit might have misled the government and affected its ability to effectively prosecute these charges. Lastly, the government could justify an enhancement under the third prong of § 3C1.1 by showing that Harris's affidavit obstructed his sentencing here. The lack of complete information about Harris's income and deductions arguably prevented the government from exactly calculating tax loss. That relegated the district court to the estimation method in U.S.S.G. § 2T1.1 (the twenty percent default tax on gross income).

The district court must determine whether Harris's 1998 income affidavit was false, and whether it obstructed the investigation, prosecution, or sentencing of one of the instant offenses.

C.

Finally, Harris contends that he must be resentenced under *Booker* because the district court erroneously treated the Guidelines as mandatory and said it would impose a shorter prison term if the Guidelines were held to be merely advisory (96 instead of 151 months). When a district court treats the Guidelines as mandatory, there is a presumption that the sentence constitutes plain error that prejudiced the defendant and warrants resentencing. *US v. Martin*, 438 F.3d 621, 639 (6th Cir.2006) (citation omitted). To rebut the presumption, the government must present "clear and specific evidence that the district court would not have ... sentenced the defendant to a lower sentence" if it had treated the Guidelines as advisory. *Id.* As the government concedes, however, the district court stated that it would impose a *lower* sentence if the Guidelines were advisory, which confirms that treating the Guidelines as mandatory prejudiced Harris and warrants resentencing.

Harris asserts that "the district court must not impose a sentence more severe than the one [it] announced in the alternative, unless evidence of subsequent wrongdoing or other basis emerges to erase the appearance of vindictiveness which would otherwise arise." This argument lacks merit. When the district court stated Harris's alternative sentence, its view of Harris and his offenses was tainted by several errors, and it is impossible to predict how correcting those

errors will affect its fashioning of a new sentence.

First, the district court erroneously used gross receipts rather than gross income when calculating tax loss under § 2T1.1. On remand, the government may show that Harris had gross income greater than the gross receipts used to calculate tax loss the first time. Second, the district court counted unpaid non-federal and FICA taxes as relevant conduct under § 1B1.3 without determining whether the nonpayment was potentially criminal under applicable laws. On remand, it might still count as relevant conduct all, some, or none of those nonpayments. Third, the district court added offense levels under § 3C1.1 due to obstruction without performing the required analysis. There is no way to tell whether it will impose an obstruction enhancement on remand.

If the district court properly analyzes these issues and imposes a sentence higher than the original alternative sentence, there will be no "appearance of vindictiveness." The new sentence will be based on analyses that were performed incorrectly or not at all last time. The "picture" of Harris and his crimes available at the original sentencing may be different from the picture available on remand.

> [In] cases in which the district court not only imposed a Guideline sentence but, treating the Guidelines as advisory, imposed as well an alternative sentence pursuant to the sentencing factors set out in 18 U.S.C. § 3553(a) ... the alternative sentence does not implicate the Sixth Amendment and the sentence need not be remanded on account of *Booker*, but must be reviewed for reasonableness.

US v. Till, 434 F.3d 880, 887 (6th Cir.2006). This rule is inapposite here, however, because the district court's alternative sentence was tainted by its erroneous determinations of tax loss, relevant conduct, and obstruction of justice. Thus, we cannot simply "sign off" on the alternative sentence.

VII.

For the foregoing reasons, we affirm Gary Harris's convictions but vacate his sentence and remand for resentencing. The district court must resentence Harris in accordance with this opinion, including the following four items. First, in calculating tax loss under U.S.S.G. § 2T1.1, the district court must receive evidence and determine Harris's gross *income,* not gross receipts, before applying the twenty percent and/or twenty-eight percent rates. Second, in determining relevant conduct under § 1B1.3, the district court may include Harris's nonpayment of state, local, and FICA taxes only if it determines that such nonpayment "amounts to an offense for which a criminal defendant could potentially be incarcerated" under the law of each jurisdiction, as required by *Shafer,* 199 F.3d at 831. Third, in determining whether Harris's offense level should be increased for obstruction under § 3C1.1, the district court must determine whether the alleged obstruction occurred "during the investigation, prosecution or sentencing of the instant offense[s] of conviction." Fourth, under *Booker,* the district court must treat the Guidelines as advisory only, and it must consider the recommended guideline range, the Commission's commentary, and the factors set forth in 18 U.S.C. § 3553(a). The district court should provide some

record of its reasoning on each of these issues in case of further appellate review. *Till,* 434 F.3d at 887.

VIII.

Next, Schwentker argues that the evidence presented at trial was insufficient to support finding her guilty beyond a reasonable doubt of a § 371 conspiracy to defraud the IRS. We disagree.

We review de novo the denial of a motion for acquittal. *US v. Tran,* 433 F.3d 472, 476 (6th Cir.2006), *cert. denied,* --- U.S. ----, 127 S.Ct. 227, 166 L.Ed.2d 180 (2006). We may reverse the district court's ruling only if, "after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *US v. Johnson,* 440 F.3d 832, 839 (6th Cir.), *cert. denied,* --- U.S. ----, 127 S.Ct. 48, 166 L.Ed.2d 49 (2006). "We are bound to make all reasonable inferences and credibility choices in favor of the jury's verdict." *Id.* Moreover, our "general hesitancy to disturb a jury verdict applies with even greater force" where, as here, the district court has already considered and denied a motion for acquittal. *US v. Lee,* 359 F.3d 412, 418-19 (6th Cir.2004).

Nonetheless, there must be substantial evidence on each element from which a jury could find Schwentker guilty beyond a reasonable doubt. Substantial evidence "must do more than create a suspicion of the existence of the fact to be established." *Hoxie v. DEA,* 419 F.3d 477, 482 (6th Cir.2005) (citation omitted). Substantial evidence is "more than a mere scintilla. It is such relevant evidence as a

reasonable mind might accept to support a conclusion." *US v. Orrico,* 599 F.2d 113, 117 (6th Cir.1979).

To prove Schwentker guilty of conspiracy to defraud the IRS, the government did not have to prove that she violated a substantive statute. *US v. Douglas,* 398 F.3d 407, 412 (6th Cir.2005) (citation omitted). Rather, it had to show that (1) two or more people agreed to accomplish an illegal objective against the US; (2) Schwentker willfully became a member of the conspiracy; (3) one of the conspirators thereafter knowingly committed at least one overt act at about the time and place alleged; and (4) that act was knowingly done in furtherance of some object or purpose of the conspiracy. *US v. Beverly,* 369 F.3d 516, 532 (6th Cir.), *cert. denied,* 543 U.S. 910, 125 S.Ct. 85, 122, 229, 160 L.Ed.2d 188 (2004).

As to the first element of conspiracy, proof of a formal agreement is not necessary; a "tacit or material understanding among the parties" will suffice. *Martinez,* 430 F.3d at 330. A conspiracy may be inferred from circumstantial evidence that can reasonably be interpreted as participation in the common plan. *Id.* (citation omitted). As to the second and third elements, a defendant's knowledge of and voluntary participation in the conspiracy may be inferred from his conduct and established by circumstantial evidence. *Id.* Once the government establishes a conspiracy beyond a reasonable doubt, the defendant's connection to it need only be "slight." *Id.*

A conviction does not require proof that Schwentker was an active participant in every phase or aspect of the conspiracy, *Beverly,* 369 F.3d at 532, or that she played more

than a minor role, so long as she understood the conspiracy's essential nature and intentionally joined, *US v. Warner*, 690 F.2d 545, 550 (6th Cir.1982). The defendant need only know of the conspiracy, associate herself with it, and knowingly contribute her efforts towards its furtherance. *Beverly*, 369 F.3d at 532.

Schwentker attacks three overt acts that the indictment alleges she committed in furtherance of the conspiracy with Harris and Kotula. First, Schwentker attacks the allegation that T & M received royalties from a company when T & M rendered no services warranting such payments:

> The evidence presented at trial, not only failed to establish that [Schwentker] knowingly participated in a conspiracy, the evidence actually established that she was unaware of any attempt to hide assets. The Government used the tax returns she filed on behalf of T & M as an example of how tax returns should be filed in order to alert the Government to the source and distribution of funds.
>
> ....
>
> [Agent Fisher] noted that [Schwentker] correctly identified money that came in as loans, correctly provided the documents which would have permitted assessment of whether the loans were legitimate and correctly provided the checks to her accountant that would have identified MC Sign as the source of the disputed income....
>
> [Agent Fisher] also testified ... that if T & M had invested money in MC Sign, the royalty payments [to

> T & M] could have been legitimate income from MC Sign. He testified ... upon being presented with that Government exhibit that it appeared to show just that, an investment by T & M in MC Sign.... His testimony clearly establishes that the overt acts identified in connection with the T & M and MC Sign transactions do not support a conclusion that [Schwentker] knowingly participated in a conspiracy to help Gary Harris evade income taxes. The evidence on these matters actually establishes that if there was such a conspiracy, they forgot to tell [Schwentker] because the forms she filed, in conjunction with the raw data left with her accountants in the event of an audit, reveal all of the sources of income and to whom each and every payment was made.

Second, Schwentker attacks the sufficiency of the evidence for the claim that she treated certain T & M expenditures as expenses when she knew they were her own income. Schwentker states that, even if she misclassified some T & M expenditures, that "is not evidence that she knowingly aided the concealment of Gary Harris' income." Agent Fisher suggested that a T & M "child care" expense should have been counted as income to Schwentker, but acknowledged that his opinion was speculative. Schwentker further argues,

> There is also no doubt that the issue of whether certain medical payments [by T & M?] should have been treated as personal income was only speculation. As Mr. Fisher testified, [Schwentker] showed each of her accountants all of the T & M

> checks and asked each of them how the various payments should be reported. There was even testimony that [Schwentker] had been told that it was perfectly all right to treat her medical expenses as a business expense. It is clear, therefore, that those overt acts do not establish an attempt to evade, or an actual evasion of, the payment of income tax or the failure to file accurate forms in support of such payment. More importantly, those overt acts and the testimony, or lack thereof, with regard to those overt acts, do not establish that [Schwentker] conferred with any co-conspirators or worked in concert with other individuals for the purpose of evading taxes which allegedly may have been due had the unnamed expenses been declared as personal income.

Schwentker's third attack on the evidence concerns off-shore accounts. On dates not specified by Schwentker, Harris provided two $10,000 checks and a $312,000 check for deposit into new accounts at TSB Bank Channel, Ltd. Schwentker explains that Harris intended the large account and one of the small accounts to benefit her and their children:

> As one of the [$10,000] accounts was to benefit [Schwentker] and her children by Gary Harris, she was issued a debit card ... and, therefore, signed the necessary forms which caused the account to be opened. There was never any testimony that [Schwentker] was ever informed that the funds used to open those accounts were in any way laundered to avoid the payment of income taxes, or that they were funds upon which income tax would have been due.

> In fact, *the only inference that can be drawn from the opening of those accounts is that they were a legitimate attempt, by the father of her children, to help [Schwentker] defray the living expenses involved in the raising [of] her children.* The records of those accounts indicate that [Schwentker] did not use the debit card, except for an initial purchase upon opening the account, until Mr. Harris was not available to contribute to day-to-day expenses because he had gone to prison.
>
> The third account at TSB ... [containing $312,000] was opened for the educational benefit of the children of Gary Harris and [Schwentker], as the records introduced at trial indicate. There was never any testimony or evidence introduced to indicate that [Schwentker] thought anything other than that the father of her children was opening an account to provide for their future. * * * *[T]he testimony indicated Mr. Harris appeared to have an enormous amount of wealth.* He was involved with numerous highly lucrative companies and large numbers of people with whom he was associated had no knowledge that any of the apparent wealth resulted from a failure to pay taxes. *Thus, a large account to provide for his children's education was not necessarily indicative of anything other than what it purported to be.* * * *
>
> Mr. Fisher testified that there was nothing wrong, in and of itself, with putting money in an off shore account, that he was aware there was evidence that

> the large account was opened as a college account for the children, and indicated that Mr. Harris had reported that money as a personal asset. In short, there is nothing about [Schwentker's] participation in the opening of these accounts that evinces her knowing participation in a conspiracy to defraud the United States Government.

However, we conclude that the government introduced sufficient evidence from which the jury could reasonably infer that Schwentker knew about the conspiracy, understood its nature, knowingly and voluntarily associated herself with it, and contributed her efforts towards its furtherance.

Despite testimony that Schwentker had no entrepreneurial or management experience, Schwentker formed T & M as a business consulting firm in 1993 and served as its president through at least 2002. In 1995, Harris sold a business named MC Sign; the contract required the buyer to retain Schwentker as a business consultant at $1,500 per month, to pay T & M $47,000 up-front, and to pay three percent of annual gross sales to T & M as royalties. Schwentker had nothing to do with MC Sign before Harris sold it, and it took the new owner only two days to conclude that she had nothing to offer. The new owner continued to pay Schwentker's monthly fee, but he asked her not to come back; after six years, the new owner paid a lump-sum "royalty settlement" of about $101,000 to end the arrangement.

Apart from MC Sign, Harris directed $25,000 to T & M in 1995 from a land sale, and in 1997 he gave T & M land

worth $70,000. Schwentker asserts that "the evidence clearly indicates that T & M was legally entitled to the money because of real estate contributed to the transaction," but she does not specify where in the record this alleged evidence is located.

In addition, T & M declared losses for every year in which Schwentker filed a tax return for it. Fisher testified that this was part of a scheme to take funds that should have been taxed as income to Harris, and divert them to T & M (whose losses would prevent it from paying tax) and Schwentker (who received income for services that she and T & M apparently did not render, or which were not useful to the recipient), enabling Harris to evade the personal income tax due on those amounts.

The jury could reasonably credit Fisher's characterization of the role T & M and Schwentker played in the scheme, given Schwentker's lack of relevant experience, the new MC Sign owner's conclusion that her services were not of value, and T & M's lack of demonstrated business relationship with the entities and transactions from which Schwentker and T & M received payment.

Moreover, in the week after depositing the MC Sign settlement check into T & M's bank account, Schwentker turned around and wrote a $15,000 check to the manager of Harris/GH Group's amusement park, supposedly as reimbursement for a loan he made to Harris; Schwentker also wrote checks of $11,400 and $16,200 to other Harris companies. Schwentker's accountant testified that she had given him the information needed to verify the loan in question, and the jury could have relied on that testimony to

conclude that T & M really was repaying a loan rather than trying to conceal who earned the income. But in light of the other suspicious circumstantial evidence, the jury could also conclude that Schwentker helped Harris by using T & M to play a "shell game," moving funds around between Harris entities so the IRS could not ascertain which company or person had earned it.

The inference that Schwentker's participation in the scheme was knowing and voluntary, and done with the purpose of furthering its object, was further supported by evidence that she knew about Harris's anti-tax sentiment. Schwentker did not merely hear Harris express political views in opposition to federal taxation of income, which certainly need not betoken tax evasion. Rather, Schwentker heard Harris admit his non-compliance with the tax laws. Schwentker does not contest that in 1995 she was present during a meeting between Harris and her accountant John Kikkunen, during which Harris admitted that he did not file federal tax returns. After the meeting, Kikkunen told Schwentker that he would no longer work for her because he was "not in business to circumvent the federal tax law." From this evidence, the jury could infer that Schwentker knew Harris was intentionally violating federal tax law, and that the unusual transactions she and T & M profited from were shams designed to evade taxes and confuse the paper trail.

Thus, even if the jury disbelieved the government's allegations regarding the off-shore accounts and Schwentker disguising her income as T & M expenses, there was sufficient evidence to find her guilty of conspiracy to defraud the IRS with Harris.

Schwentker also contends that her conviction for 18 U.S.C. § 371 conspiracy to defraud the IRS is against the manifest weight of the evidence. We disagree.

The district court's duty was to compare the opposing proofs, weigh the evidence, and set aside the verdict if it finds that it is "against the clear weight of the evidence." *Barnes v. City of Cincinnati,* 401 F.3d 729, 743 (6th Cir.2005). The district court may reverse the conviction if the government presented enough evidence to convict, but the judge disagrees with the jury's resolution of the conflicting evidence. *US v. Lutz,* 154 F.3d 581, 589 (6th Cir.1998). The district court may act as a thirteenth juror, considering the credibility of the witnesses and the weight of the evidence to insure that there is not a miscarriage of justice. *Id.* Our role, however, "is not to sit as a thirteenth juror and re-weigh the evidence, but to examine the evidence to determine whether the district court's ruling that the verdict is not against the manifest weight of the evidence was a clear and manifest abuse of discretion." *Id.* (quotation marks omitted).

Schwentker offers a plausible interpretation of the evidence and a serviceable explanation of her innocent state of mind and the business purposes behind some of the T & M and other transactions. But the guilty verdict against Schwentker was not unreasonable. The jury was free to draw inferences, assess witnesses' credibility, and interpret the evidence for or against Schwentker. The fact that Schwentker's account of events and their legal significance is itself reasonable did not obligate the district court to disturb the decision of Schwentker's peers. *See Barnes,* 401 F.3d at

Indeed, even if we found Schwentker's account of events *more reasonable* than the government's, that would not render the government's account unreasonable. *Porter v. Lima Mem. Hosp.*, 995 F.2d 629, 635 (6th Cir.1993) ("[T]he verdict should not be considered unreasonable simply because different inferences could have been drawn or because other results are more reasonable."). This is not the "extraordinary circumstance where the evidence preponderates heavily against the verdict" against Schwentker. *US v. Graham*, 125 Fed.Appx. 624, 628 (6th Cir.2005).

IX.

Like Harris, Schwentker and Kotula contend that their convictions should be vacated due to the admission of agent Koritala's testimony about statements by alleged "abusive shelter promoter" Douglas Carpa, who is not charged in this matter. This argument lacks merit.

Immediately after Koritala testified, the district court cautioned the jury that the government had introduced Koritala's testimony only against Harris and not against the other defendants. We presume that jurors follow the court's instructions. *US v. Savoires*, 430 F.3d 376, 380 (6th Cir.2005). Therefore, absent good reason to believe otherwise, we hold that the jury's convictions of Schwentker and Kotula were not based on or influenced by agent Koritala's testimony against Harris.

X.

Schwentker contends that the district court abused its discretion by admitting the testimony of IRS agent Fisher. She claims that the U.S. failed to comply with Fed.R.Crim.P. 16(a)(1), Government's Disclosure-Information Subject to Disclosure, which provides,

> (G) Expert witnesses.-At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief.... The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

Fed.R.Crim.P. 16(a)(1)(G). If the government does not timely disclose the summary, Fed.R.Crim.P. 16(d)(2) authorizes the district court to prohibit the government from introducing the undisclosed testimony, or to make such other order as is just under the circumstances. Unhelpfully, the Rule does not specify *when* the government must produce the summary, e.g., a certain number of days after the defendant's request, before the trial starts, or before the expert testifies.

Schwentker alleges that the government did not provide a summary of Fisher's testimony until the eve of trial, a tactic that left her inadequate time to prepare to counter the testimony. The government responds that it made its first 16(a)(1)(G) disclosure on September 5, 2003, nearly four months before trial started, and supplemented it on December 17, 2003. The government does not specify

which disclosure contained the required material about Fisher's expected case-in-chief testimony, so we assume it was the later disclosure on December 17, 2003. That was right before trial started. The government points out, however, that Fisher did not testify until six weeks later, on January 27, 2004, which gave Schwentker adequate time to prepare to counter Fisher's testimony.

For two reasons, we review a district court's rulings regarding Fed.R.Crim.P. 16(a)(1)(G) disclosure only for an abuse of discretion. First, the abuse-of-discretion standard governs evidentiary rulings generally. *US v. Abboud,* 438 F.3d 554, 579 (6th Cir.2006), *pet. cert. filed,* 75 U.S.L.W. 3106 (U.S. Sept. 7, 2006) (No. 06-348). Second, we used the abuse-of-discretion standard to review determinations that an expert disclosure met the requirements of predecessor Fed.R.Crim.P. 16(a)(1)(E). *US v. Tarwater,* 308 F.3d 494, 515 (6th Cir.2002) (citing *US v. Azad,* 809 F.2d 291, 294 (6th Cir.1986)); *US v. Wells,* 211 F.3d 988, 996 (6th Cir.2000) (citing, *inter alia, US v. Bonds,* 12 F.3d 540, 554 (6th Cir.1993)).

Even where it is an abuse of discretion to admit expert testimony without Fed.R.Crim.P. 16(a)(1)(G) compliance, "reversal is inappropriate unless the defendant establishes prejudice by demonstrating that it is likely that had the government complied with the discovery rule (not had the evidence been suppressed), the verdict would have been different." *US v. Batts,* 171 Fed.Appx. 977, 982 (4th Cir.) (citation omitted), *cert. denied,* --- U.S. ----, 127 S.Ct. 160, 163, 324, 325, 166 L.Ed.2d 113 (2006); *cf. US v. Lopez,* 271 F.3d 472, 483-84 (3d Cir.2001) (reversal proper only when Fed.R.Crim.P. 16 violation results in "prejudice

to substantial rights").

It might have been better to require the government to provide Schwentker with the requested summary by a date certain well in advance of trial, as numerous courts have done. *See, e.g., US v. Ma,* No. 03CR734, 2006 WL 708559, at *18 (S.D.N.Y. Mar. 21, 2006) ("While no specific timing requirements are imposed, the Committee Notes also say that disclosures are expected to be made in a 'timely fashion.' Accordingly, if the government expects to use any expert witnesses at trial, the government is directed to disclose them to defendants no later than two weeks before trial."). The government's statement that it provided the summary weeks before Fisher testified is not completely reassuring because that was right before trial started, and defense counsel had little time to prepare an effective cross-examination while participating in a complex trial.

Nonetheless, there are two reasons why reversal is not warranted by the government's somewhat belated disclosure of the Fisher summary. First, while we might prefer Schwentker to have had the benefit of the summary farther in advance of trial, the Rule contains no such requirement. It is for Congress to amend Fed.R.Crim.P. 16(a)(1) to impose any such bright-line temporal limitation, and Congress has not chosen to do so.

Moreover, defense counsel had *some* time in the weeks between receiving the summary and confronting Fisher in court, and Fisher was extensively cross-examined regarding his qualifications, his work on this case, and the basis for his opinions on the taxes due from defendants. *Cf. US v. Seiber,* No. 96-6463, 142 F.3d 438, 1998 WL 165153,

at *4 (6th Cir. Apr. 3, 1998) (although the government did not disclose the expert's qualifications until just after the expert testified on Friday morning, defendant was not prejudiced, because he still had time to recall the expert for cross or move to exclude his testimony, but failed to do so). In addition, Schwentker has not claimed that Fisher's testimony exceeded the scope of the summary or otherwise unfairly surprised her. *Contrast US v. Beltran-Arce,* 415 F.3d 949, 953-54 (8th Cir.2005).

For these reasons, we conclude that the district court did not abuse its discretion by admitting Fisher's testimony. *See generally US v. Sarracino,* 340 F.3d 1148, 1170 (10th Cir.2003), *cert. denied sub nom. Theresposy v. US,* 540 U.S. 1131, 124 S.Ct. 1105, 157 L.Ed.2d 935, *and sub nom. Manuelito v. US,* 540 U.S. 1133, 124 S.Ct. 1109, 157 L.Ed.2d 938 (2004).

In addition, even assuming arguendo that the district court should have excluded Fisher's testimony, we are not convinced that its admission prejudiced Schwentker's substantial rights, *US v. Lopez,* 271 F.3d 472, 483-84 (3d Cir.2001), or that an earlier disclosure likely would have led to a verdict of acquittal, *US v. Chastain,* 198 F.3d 1338, 1348 (11th Cir.1999). *Cf. Tarwater,* 308 F.3d at 516 (although the government gave defendant revised summary of expert's expected testimony just the day before the expert testified, there was no 16(a)(1)(E) violation because the revisions were necessitated by information acquired from defendant "not long before trial," defense counsel had a chance to review revised report that evening, and defendant did "not suggest how the outcome of the case would have been different if he had learned about [the expert]'s revised

computations earlier").

Schwentker further claims that, although the district court promised to conduct limited *voir dire* of Fisher to determine whether he was qualified to give the offered testimony, it never did so. Schwentker contends Fisher's testimony demonstrated that he was not qualified to give the testimony, but she fails to specify *how and why* Fisher was not qualified.

The government responds to Schwentker's assertion that Fisher was unqualified and her contention that the district court should have held a *Daubert* hearing:

> Fisher was a properly qualified expert. He had specialized tax audit and accounting training that made him well-suited "to assist the jury in understanding the large amount of documentary evidence presented by the government and the tax implications." *United States v. West,* 58 F.3d 133, 140 (5th Cir.1995);....
>
> ....
>
> No *Daubert* hearing was required here. The District Court's gatekeeping responsibility was to ensure that Fisher's testimony was relevant and reliable. Before eliciting Fisher's expert opinions, the government established that he was an IRS agent assigned to the Special Enforcement Program. He worked with IRS criminal investigators and federal prosecutors, performing financial analysis and testifying in court. [JA] 3771-72. Before that assignment, Fisher had been an IRS revenue agent for 15 years, performing audits of individuals, corporations, partnerships, and

> trusts. He had done more than 500 such audits. Fisher had a college degree in accounting and ... extensive continuing professional education within the IRS. [JA] 3772-73.
>
> ....
>
> Fisher was extensively cross-examined on a variety of topics: his professional background and experience, his work on the instant case, ([JA] 3864-69), the technical basis for his "taxes due" opinions ([JA] 3869-77), and his opinion that Kotula's sale did not qualify for tax deferral ([JA] 3896-3913).

Schwentker's opening brief fails to identify any shortcoming in Fisher's qualifications or methodology, either generally or as related to the testimony he gave. Schwentker's reply does not address the Fisher issue, let alone contest the government's statement of Fisher's qualifications. Thus, Schwentker has abandoned or waived the argument that Fisher was unqualified. *See Caudill v. Hollan,* 431 F.3d 900, 915 n. 13 (6th Cir.2005) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") (citation omitted).

XI.

Schwentker also contends that the district court should have excluded evidence that codefendant Harris purchased gold and silver and used secret accounts in a warehouse bank:

> [Schwentker] had no connection to these activities but the evidence necessarily buttressed the

> government's case on the conspiracy count, and therefore, unfairly prejudiced [Schwentker]. The jury could have been convinced by this evidence,***507** along with the cumulative effect of Agent Koritala's testimony, also inadmissible against [Schwentker], that Mr. Harris engaged in tax fraud [presumably, with "untaxing" scheme promoter Douglas Carpa] during the conspiracy period. Because it was conspiracy that was alleged, in order to find Mr. Harris guilty, the jury necessarily had to find co-conspirators.... This is true despite the fact that [Schwentker's] connection to the testimony was attenuated at best. It is, therefore, highly likely that this prejudicial evidence contributed to the finding of guilt against [Schwentker] simply by strengthening the evidence against Mr. Harris on ... the conspiracy count. This prejudicial error is compounded by the fact that the evidence had no relevance to the issue of conspiracy among the co-defendants, especially when any evidence of conspiracy is so weak.

Although Schwentker does not cite any rule, she essentially contends that the precious-metals and warehouse-bank evidence was substantially more prejudicial than probative under Fed.R.Evid. 403. The government's brief does not respond to this argument.

It was IRS Agent Walker who testified about Harris's use of precious metals and the CPA bank. While discussing an account statement and other documents bearing Harris's name or account number that were seized in a search of the CPA's Portland, Oregon premises, Walker testified:

Q. Now, this first group right here, it says balance carried forward. What does this mean here?
A. [T]he balance carried forward referred to your previous statement of your last activity. And then below that you have federal reserve notes, gold units, silver coin units, and silver rounds. And that's basically if you had-that would show you how you had your money held.

If you deposited money and you wanted to buy gold coins, it would tell you how much you had in units. If you wanted to keep it in federal reserve notes, which is actual dollars, that's what the balance would reflect.

Q. And in the next section here, it says deposits received?
A. Yes.

Q. Do you know what this refers to?
A. Yes. That was a representation of what you actually, you submit to the coin exchange. So if you sent them checks they would give you a total of your checks. If you sent them cash, they would identify how much cash you had, and if you decided you wanted to deposit and use your gold coins or your silver coins, you would deposit that and they would give you how much they received, give you a balance of that.

....

Q. And turning to the next page of this document here.
A. This document is dated November 10th, 1995.

> Q. What does this document show here?
> A. This document will actually show a deposit of checks in the total amount of $3,000. And then later at the bottom it shows that the money was sent out in cash of $2,895. And there was also another $60 transfer fee or fee there. And then there was a transaction charge for the actual transaction.
>
> Q. And what's that transaction charge?
> A. The transaction charge is the fee for the purchase, or how they sent the money back out. They did-down there they also charge you for your ***508** deposit. [T]he deposit fee was like 2 percent of your deposit for the first $500, and then I think it was-
>
> Q. So the transaction charges that's the money that the Christian Patriot Association gets; is that right?
> A. Yes.

Walker testified about other warehouse-bank statements and mail receipts that showed much larger deposits to Harris's account, followed by a processing fee for the deposits and a transaction fee when the bank sent the remainder of the deposits back to Harris or to conventional-bank accounts of Harris or his companies.

Agent Walker also testified about the CPA's literature, which emphasizes that the CPA does not provide records to the IRS, does not admit the existence of a client's account or the presence of funds in the account and, arguably at least, implies that the bank would not cooperate with a summons, subpoena, or levy.

As with agent Koritala's testimony about Carpa's statements, agent Walker's testimony about Harris's use of the warehouse bank was highly probative of Harris's state of mind with regard to defrauding the IRS. It is not illegal to use a warehouse bank, conduct one's affairs in cash, or keep one's savings in precious metals rather than dollar notes, but that does not prevent a reasonable jury from inferring Harris's intent to evade in part from Harris's use of such measures, which the CPA and Carpa touted as effective means of thwarting government tax investigation. Thus, Walker's testimony about Harris's use of precious metals and the CPA warehouse bank was highly probative of the *mens rea* element of the offenses charged against Harris. Conversely, there was a risk that the jury would find that, because Harris associated and conducted business with people who touted strategies for tax evasion, his employee and girlfriend Schwentker must have conspired with Harris to evade taxes. *US v. Chance,* 306 F.3d 356, 385-86 (6th Cir.2002) ("[E]stablishing guilt by association ... is an improper manner by which to obtain a conviction...."). On balance, it is not an abuse of discretion to find that the probative value of Walker's testimony as to Harris's *mens rea* was not substantially outweighed by the risk of unfair prejudice to Schwentker.

XII.

Next, Schwentker argues that under Fed.R.Evid. 404(b), the district court abused its discretion in admitting evidence of other wrongful acts by her codefendants. Schwentker contends that the district court should not have admitted evidence that Harris and Kotula failed to file

returns for years or entities that are outside the scope of the instant alleged conspiracy, e.g., the Conneaut Lake park (for a time owned and operated by Harris or GH Group).

Schwentker contends that none of this evidence was probative of the offenses charged, and its admission prejudiced her because it was used to support the government's case on the conspiracy charge. Generally, Schwentker contends that Harris and Kotula's past failure to file returns cannot demonstrate knowledge of the federal tax laws and the obligations they impose. As to the failure to file returns for the amusement park, Schwentker states that there is no evidence that Harris or Kotula was responsible for paying employee withholding taxes relating to the park. Lastly, Schwentker asserts there is no basis to conclude that the park's failure to pay taxes furthered the instant conspiracy. (The government's brief does not address the 404(b) issue.)

We disagree with Schwentker. Federal Rule of Evidence 404(b) provides,

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it

intends to introduce at trial.

The list of purposes for which other-acts evidence may be admitted is not exhaustive; evidence may be admitted for additional, similar purposes. *US v. Bakke,* 942 F.2d 977, 981-82 (6th Cir.1991).

Because Schwentker preserved the issue by objecting below, we apply the usual tripartite test for admission of evidence under Fed.R.Evid. 404(b). First, we review for clear error the factual finding that the other acts occurred; second, we review de novo the determination that the evidence was admissible for a legitimate purpose, rather than to prove defendant's character and action in conformity with that character; and third, we review for abuse of discretion the determination that the "other acts" evidence is not substantially more prejudicial than probative under Fed.R.Evid. 403. *US v. Matthews,* 440 F.3d 818, 828 (6th Cir.), *cert. denied,* --- U.S. ----, 126 S.Ct. 2370, 165 L.Ed.2d 292 (2006).

Under the first other-acts criterion, evidence is admissible under 404(b) only if it is relevant. *Matthews,* 440 F.3d at 828. This requires that other-acts evidence be admitted only if the district court concludes that the jury could reasonably find, by a preponderance of the evidence, that the other acts occurred and that the defendant was the actor. *Id.* "[S]uch findings need not be express, but rather, may be implicit by virtue of the fact that the court admitted the evidence." *Id.* Schwentker does not deny that the jury reasonably could have found, by a preponderance, that the other acts occurred, i.e., that Harris and Kotula failed to file returns for themselves or Harris-affiliated entities (such as

the park) in years prior to this conspiracy. Accordingly, she provides no basis to conclude that the district court clearly erred in its implicit finding to that effect. *Cf. US v. Logan,* 250 F.3d 350, 368 (6th Cir.2001) ("Appellants do not contest the first ... element [ ], implicitly admitting that the bad acts transpired....").

Under de novo review of the second other-acts criterion, the district court did not err in determining that the evidence was admissible for a legitimate purpose, rather than to prove defendants' character and action in conformity with that character. Harris and Kotula both denied that they intended to violate federal tax law. Harris claimed that he had no intent to evade the taxes due on his income for years covered by the prior plea, but honestly believed that his compliance with the prior agreement satisfied his liability for those years. Harris also claimed that his failure to file while he was incarcerated stemmed not from an intent to evade, but from his honest belief that incarceration entitled him to an extension of time. *Cf. Matthews,* 440 F.3d at 827-29 (not abuse of discretion to admit testimony that defendant made drug transactions *eight years* before the charged drug offense, because it tended to rebut defendant's claim that he found the bag of cocaine on the ground, did not know what it was, and put it in his pocket anyway). Kotula likewise denied ever intending to violate a known duty under the federal tax laws during the alleged conspiracy period.

Accordingly, evidence that Harris failed to file returns for himself or his companies for other, earlier years was admissible as "proof of motive, ... intent, preparation, plan, knowledge, [and] ... absence of mistake or accident." Fed.R.Evid. 404(b). The jury could reasonably infer that

such a sustained streak of non-filing and nonpayment by Harris and Kotula reflected not a mistaken understanding of their duties under federal tax law, but an intent to shirk those duties. *Cf. US v. Popenas*, 780 F.2d 545, 548 (6th Cir.1985) (in prosecution for tax evasion, it was not an abuse of discretion to admit returns from seven prior years, because they arguably showed a pattern of under-reporting income, from which the jury might reasonably infer that the charged evasion was willful); *US v. Ausmus*, 774 F.2d 722, 727-28 (6th Cir.1985) (in prosecution for willfully failing to pay taxes, it was not an abuse of discretion to admit evidence that he failed to pay taxes for years before and after the years charged in the indictment, to show a pattern, plan, or scheme and dispel the notion that the charged nonpayment was due to negligence or inadvertence).

Of course, the jury might also conclude that all of Harris's and Kotula's non-filings and nonpayments, both within and outside the conspiracy period, were caused by a sincere belief that they were not required to file returns and pay taxes, or that they had already done all that was required. But the fact that the jury could find either way does not negate the legitimate purpose for which the evidence was admitted, and the reasonable inference that could be drawn from the evidence on the issue of Harris's and Kotula's *mens rea* and lack of mistake.

Under the third other-acts criterion, it is not an abuse of discretion to find that the "other acts" evidence is not substantially more prejudicial than probative under Rule 403. To determine whether other-acts evidence is probative of intent, we ask whether the evidence relates to conduct that is "substantially similar and reasonably near in time to the

specific intent offense at issue." *US v. Haywood,* 280 F.3d 715, 721 (6th Cir.2002) (internal quotation marks and citations omitted). "When an act and a charged offense are so dissimilar that the act has no logical tendency to prove the intent element of the charged offense, no degree of temporal proximity will infuse the act with probative value." *Id.* at 722.

As to the first element of the third other-acts criterion, Schwentker does not deny that the other acts are substantially similar to the charged offenses, and they are: the other acts were a failure to file federal income tax returns and pay federal income taxes, and the charged offenses were conspiracy to evade federal income taxes (by all three defendants), tax evasion by Harris, and tax evasion by Kotula. *See Abboud,* 438 F.3d at 582-83 (evidence that defendant previously paid employees "under the table" to evade payroll taxes, was properly admitted under 404(b) where it was sufficiently similar to the instant charged offenses of failure to file a return and filing a false return); *US v. Jerkins,* 871 F.2d 598 (6th Cir.1989) (evidence that defendant made late return filings in 1969-1971 was properly admitted under 404(b) as sufficiently similar and close in time to charged offenses, which involved land transactions starting in 1977, preparation of defendant's own false returns in 1982 and 1984, and preparation of false returns for defendant's client from 1980-1982).

As to the second element of the third other-acts criterion, Schwentker states,

> The Court [in *US v. Haywood,* 280 F.3d 715 (6th Cir.2002)] held that the five[-]month period between

> the charged act and the other act sought to be admitted by the government was so great that greater similarity was required before the other act could be admitted. Therefore,***511** the Sixth Circuit held that the district court erred in admitting the other[-]act evidence.

But Schwentker's reliance on *Haywood* is misplaced. Although the time elapsed between the other acts and the charged conduct is a factor to be considered, this court has declined to adopt a bright-line rule regarding remoteness. *Matthews*, 440 F.3d at 830 (citation omitted) ("There is no absolute maximum number of years that may separate a prior act and the offense charged."). Moreover, the nature of the other acts and the charged offenses must inform the analysis of whether the former are sufficiently close in time to the latter. *Id. ("[T]he* prior conduct must be reasonably near in time *under the facts of the particular case.")* (emphasis added).

Absent evidence to the contrary, our understanding is that federal individual and corporate income tax returns are generally due annually. *See Smith v. CIR*, 153 Fed.Appx. 449, 450 (9th Cir.2005) ("I.R.C. § § 6011, 6012, and 6072 mandate that ... Smith file a return for every year that he earns income.").[4] Consequently, any two instances of non-filing or nonpayment would necessarily be at least one year

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[4] *See, e.g., Robinette v. CIR*, 439 F.3d 455, 462 (8th Cir.2006) ("It is clear ... that Robinette's duty to file a tax return *each year* was an express condition ....") (emphasis added); *Jimenez v. Gonzales*, 158 Fed.Appx. 7, 8 (9th Cir.2005) ("He filed a federal income tax return for the first time in 1990, and has filed returns *every year* since then.") (emphasis added).

apart because the deadlines for two consecutive years' filing and payment are one year apart. It is not error to find that the other acts were sufficiently close in time to the conspiracy period to be probative of Harris's and Kotula's intent or knowledge with regard to tax years during the period. *Cf. US v. Middleton,* 246 F.3d 825, 835-36 (6th Cir.2001) (in prosecution for attempted evasion of taxes due for 1992-1996, not an abuse of discretion to admit 1976 return under 404(b)).

Finally, Schwentker asserts that there is no basis to conclude that the amusement park's failure to pay taxes furthered this conspiracy. Even if true, this is beside the point: the admissibility of other-acts evidence does not turn on whether the other acts were intended to further, or actually did further, the charged offenses. Schwentker cites no authority to the contrary, and we find none.

The district court did not abuse its discretion in admitting evidence of Harris's and Kotula's alleged pre-conspiracy failures to file federal income tax returns and pay federal income taxes.

XIII.

Schwentker also contends that the district court abused its discretion by admitting Government Exhibit 452, a handwritten organizational chart, without requiring the government to authenticate the document and show foundation and relevance. The government provided no evidence regarding when the chart was created or who created it. Schwentker reasons that the chart prejudiced her by linking Kotula to the entities depicted, which bolstered

the allegation that there was a conspiracy. Schwentker does not cite any evidence rule or case law in support of this argument, so she has waived it.

Moreover, Schwentker does not claim that she or the other defendants objected to the admission of the chart. Federal Rule of Evidence 103(a) provides,

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and ... [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context....

Fed.R.Evid. 103(a)(1). *See, e.g., US v. Midwest Specialties, Inc.*, 142 F.3d 296, 302 n. 5 (6th Cir.1998) (contractor waived claim that brake test results provided by government were not supported by affidavit or otherwise authenticated, because contractor never challenged authenticity before the district court) (citations omitted). Fed.R.Evid. 103(d) states, "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." But Schwentker does not purport to show that admission of the chart was plain error.

XIV.

The district court permitted the government to read the jury excerpts from Harris's deposition in two civil proceedings in Pennsylvania state court: *Asset Mgmt. v. Trustees of Conneaut Lake Park, Inc.*, No. 1999-746

(Pa.Cmn.Pleas) and *Watson v. Trustees of Conneaut Lake Park, Inc.*, Equity Case No. 1998-8, 765 A.2d 1068 (Pa. Cmn. Pleas 2002).

Schwentker and Kotula argue that the admission of Harris's civil testimony was error requiring reversal because the testimony was allegedly hearsay, did not consist of coconspirator statements under Fed.R.Evid. 801(d)(2)(E), and its admission violated their Sixth Amendment Confrontation Clause rights as interpreted by *Crawford*. Schwentker asserts that she "has standing to raise this argument because the improperly admitted testimony was not in furtherance of the conspiracy count under which she was charged and [she] had no opportunity to cross-examine Mr. Harris."

For his part, Kotula explains that the erroneous admission of Harris's civil testimony without a chance to cross-examine Harris, prejudiced him

> because it fingered Kotula as part of the "management team" at Conneaut Lake Park, which the government contended was a significant source of unreported income.
>
> ....
>
> Additional prior testimony of Harris related to Harris's relationship with Douglas Carpa with whom Harris was found to have conspired in regard to abusive trusts, and Asset Management, a matter with which, even the district court admitted, Kotula had no involvement. [JA] 4146-4147. [S]ince there was no opportunity for cross-examination, Kotula was unable to impeach this testimony.

> * * * This testimony ... prejudiced Kotula because it was presented together with Harris's other testimony referencing [sic] Kotula and without cross-examination.

Kotula objected to admission of Harris's civil testimony at the time; Schwentker apparently did not. The district court let them both argue against its admission. Kotula's counsel argued that "[t]here's no nexus at all between any conspiracy to defeat the collection ... of the tax obligations of Mr. Kotula, Mr. Harris, and Ms. Schwentker in connection with [Harris] testifying before a Pennsylvania State Court Judge on a replevin action."

The trial judge responded that Harris's civil testimony took place within the alleged conspiracy period and was "related to the operation of Conneaut Park which is part and parcel of the government's conspiracy allegations...." Therefore, it seemed to be an "open issue" whether Harris gave his civil testimony in furtherance of the instant alleged conspiracy.

Despite the prosecutor's initial in-court assurance that Harris's civil testimony was not being offered against Schwentker, Kotula's counsel retorted that "[i]f it's a conspiracy, it comes in against all of the defendants, and it reinforces our argument that it really should be out as to anyone except Mr. Harris, if it comes in at all." The judge responded, "Well, all the government has to prove ... it doesn't require all three [defendants] be involved in ... this particular matter." He may have meant that, to prove that Harris was part of this conspiracy, the government could

introduce evidence that Harris committed an overt act in furtherance of the conspiracy-such as an act relating to Conneaut Lake or Asset Management-without proving that Schwentker and Kotula participated in that act. The district court's reasoning is not entirely clear on this issue.

The government introduced this excerpt from Harris's April 24, 2002, civil deposition:

> Q. What responsibilities ... did you have [as] president of Summer Resorts?
> A. I was president as an honorary member. I'm not sure as to what portion of liability I would have or-I do remember them offering a position and at the time I was the trust manager for Resort Holding Trust which was buying the property.
>
> ....
>
> Q. Let me stop you. You said "them," you were asked by "them." Who is "them"?
> A. A group of managers, a management team that had been hired to put the Park back together. A group of people; I can't remember their names.
>
> Q. None of the names?
> A. I think Mike Kotula was with us early.
>
> ....
>
> Q. [W]hat do you believe his occupation to be?
> A. Actually, he used to be an administrative assistant.
>
> Q. For?
> A. A number of companies that I was involved in.[5]

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[5] The government also introduced an excerpt from Harris's

August 12, 2002, deposition in another prior state civil case:

Q. Mr. Harris, you've testified that you're the trust manager of Asset Management.
A. That's correct.

Q. What is Asset Management?
A. It's a business holding trust organization.

....

Q. [A]t some point in the early 90s, 1994, you were looking into trust entities?
A. Yes. Yes, actually, in the 80s it started, but it ended up in the 90s with Crown Enterprises.

Q. Now, the Crown Enterprises is the company that you went to to have these documents prepared for the trust?
A. Yes.

Q. What type of work did Crown Enterprises do with regard to the formation or creation of Asset Management?
A. Well, they were the administrators for the trust. They actually promote the trust as a tax shelter. * * *

Q. Did Crown Enterprises have the documents prepared to create Asset Management?
A. Yes.

Q. Did Crown Enterprises obtain the people who would act as trustees for the trust?
A. Yes. They organized the trust .... just the same as a trust lawyer would do.

Q. Now, it identifies-there's a signature on that page identified as Douglas J. Carpa, trust officer. Was Mr. Carpa someone you communicated with in regard to the trust?
A. Yes. I have talked with him. I don't recall the dates I talked to him, but I had talked to him and I had letters from him. But the main person I've talked to was Bloomquist.

....

A. He was the trust administrator.

Q. Let's focus now on the events that led up to the August 1997 conveyance of the land of the park. [S]et the stage what led you to suggest ... some type of conveyance....
A. .... I'd been indicted for one count of tax evasion for 1987.... I was at that time found guilty. I appealed. The Sixth Circuit confirmed [sic] my conviction.....

Q. What was ... the anticipated function or purpose of this newly formed corporation, trustees of Conneaut Lake Park, Incorporated?
A. [A] board of honorary members of the community ... that would ... make sure that it maintained itself as an amusement park. They had absolutely no control over the operation nor the assets. They only owned the land and the land, in our view, was at risk because of my involvement with the government.

Q. And did your trust have involvement in operating the park in 98?
A. In 1998 we helped select Conneaut Lake Park, Inc., the entity that was established to operate the park ... at my direction, [it] opened the park after one of the previous people that had been selected by the board left. [W]e would have had no problem with them finding an operator after the settlement.... It was in our best interest. And the only reason the settlement ... called for an operator [was] because they knew that I was going to go to jail, so we all knew that we needed a good operator. It wasn't that I was giving up rights to operate it.

I could have operated it under my lease, but I knew that I would not be there and I wanted them to feel that they were participating in it. These people wanted arm's length. These people didn't even know me and this tax, you know, investigation was really tainting the park and it was tainting them they felt.

At trial, the prosecutor offered Harris's civil testimony as coconspirator statements against all three defendants. The judge admitted the testimony for these reasons:

> First of all, it appears ... that the testimony is [in the nature] of a statement made by a co-conspirator of a party during the course and in furtherance of the conspiracy.
>
> ...
>
> These are preliminary findings.... They are certainly not-not final determinations, but based upon the state of the evidence of this case, the Court does believe that there has been a sufficient showing that there was a conspiracy in existence; that Mr. Harris and/or Mr. Kotula at least arguably were members.... [T]he defendant against whom this statement is offered is both Mr. Kotula and Mr. Harris, and again arguably at this point there has been some showing that they were members of a conspiracy.

Q. You testified that you determined the land was at risk so you determined to donate it to the Conneaut Lake Park Preservation Fund. And then, subsequently, that didn't materialize and you determined to donate it to the trustees of Conneaut Lake Park. Why did you believe the land was at risk?
A. [T]o be quite honest, I was dealing with a government agency, you know, and at that point, with my incarceration coming.... [I]t's possible they could have ... seized it....

The government then rested and trial concluded.

> That the statement was made in furtherance of the conspiracy, I believe there's been sufficient evidence to show the same. The government has alleged overt acts related to Conneaut Park, the operation of the park, and other transactions related to same so there's been a sufficient showing of that fact.

We conclude it was not an abuse of discretion for the trial court to rule that Harris's civil testimony was a coconspirator statement admissible against Schwentker and Kotula.

Kotula contends that Harris's civil testimony could not have been made "in furtherance of" this conspiracy because "[t]he last overt act referenced in the indictment was dated April 24, 2002, prior to Harris's testimony." This argument lacks merit. "[A] statement that simply informs a listener of the declarant's criminal activities is not made in furtherance of the conspiracy; instead, the statement must somehow advance the objective of the conspiracy." *US v. Manfre,* 368 F.3d 832, 838 (8th Cir.2004) (quotation marks and citations omitted). The district court could reasonably find that Harris intended to advance this conspiracy through his depositions in civil actions that he instituted to regain operational control over the park.

As Kotula acknowledges, "Conneaut Lake Park was a part of the Count 1 conspiracy alleged by the government and a significant part of the tax loss." For its part, the government emphasizes Agent Torbic's testimony that the park was a source of cash for Harris, as well as Agent Fisher's testimony that the park was virtually audit-proof and that Harris failed to document and deposit some cash received by the park.

As the government points out, Harris admitted that he had not signed a federal income-tax return since 1981, and that he created the non-profit Trustees and transferred the park grounds to them in August 1997 because he was concerned that the government might seize the property to satisfy his delinquent tax obligations. The government's theory, which is not inconsistent with the record, is that Harris deliberately gave the appearance of conveying the entire amusement park-grounds, assets, and operating rights-to the Trustees, so that the government could not seize it to satisfy his tax liabilities.

Just a few weeks later, the U.S. Attorney approved the 1997 plea resolving the previous tax charges against Harris, which apparently led Harris to believe that the government no longer posed much risk of seizing the park. Harris began asserting that he had given the Trustees only the park's land, not its assets or the right to control and operate the park, and he sued the Trustees accordingly.

In sum, the government presented evidence sufficient to permit the jury's findings that the amusement park was used as part of an ongoing scheme to evade federal income taxes properly owed by Harris and/or GH Group. Harris intended his civil testimony to help restore his control of the park's assets and day-to-day operations-in other words, to regain a tool that had been useful to him and the alleged conspiracy. Thus, it was not clear error to conclude that Harris made the civil statements during the course of and in furtherance of the instant conspiracy. *See US v. Franklin*, 415 F.3d 537, 552 (6th Cir.2005) (district court's determination whether a statement was made in furtherance

of conspiracy is reviewed for clear error, not abuse of discretion like the ultimate 801(d)(2)(E) admissibility ruling) (citation omitted). In turn, it was not an abuse of discretion to admit Harris's civil statements as non-hearsay coconspirator statements under Rule 801(d)(2)(E).

XV.

Schwentker and Kotula also contend that the district court erred by denying her motion for severance, given that a joint trial deprived them of Harris's exculpatory testimony and placed before the jury much evidence that was admissible only against Harris. We disagree.

We review the denial of a defendant's severance motion only for "clear abuse of discretion." *US v. Beverly,* 369 F.3d 516, 534 (6th Cir.) (citation omitted), *cert. denied,* 543 U.S. 910, 125 S.Ct. 85, 122, 229, 160 L.Ed.2d 188 (2004).

The severance of jointly indicted defendants is an "extraordinary remedy, employed only to alleviate 'a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.' " *Franklin,* 415 F.3d at 556 (citation omitted). A defendant seeking severance "bears a strong burden and must demonstrate substantial, undue, or compelling prejudice." *Id.*

It is difficult to meet this burden by claiming that the jury probably considered evidence against one defendant that was introduced only against another: "juries are presumed to be capable of following instructions ... regarding the sorting

of evidence and the separate consideration of multiple defendants." *Franklin*, 415 F.3d at 556 (citations omitted).

The evidence may support the conclusion that Harris founded and played a far greater role in the conspiracy than Schwentker and Kotula, and the government did introduce evidence that pertained only or primarily to Harris and overt acts performed by him without any apparent assistance or coordination from Schwentker and Kotula. But "a defendant is not entitled to severance simply because the evidence against a co-defendant is far more damaging than the evidence against him." *Beverly*, 369 F.3d at 534 (citation omitted).

It is also plausible that Schwentker and Kotula would have had a better chance of acquittal if tried separately from Harris-in part because they could have subpoenaed Harris to testify. But a defendant does not acquire a right to separate trial merely because that would increase his chance of acquittal. *Id.* Even putting aside the presumption that the jury followed instructions and considered evidence only against the defendant against whom it was offered, speculative concerns about the spillover of evidence against Harris are unavailing. "Absent a showing of substantial prejudice, spillover of evidence from one case to another does not require severance." *Id.; see, e.g., Ross v. United States*, 339 F.3d 483, 493-94 (6th Cir.2003).

In short, it might have been reasonable to try Schwentker and Kotula separately from Harris,[6] but we do

[6] The district court acknowledged to Schwentker's counsel, "the vast majority of the witnesses were not in any way, shape or

not conclude that the district court abused its discretion in refusing to do so.

XVI.

For the reasons previously discussed regarding Harris's conviction, we uphold the trial court's refusal to give Schwentker's requested jury instruction regarding good faith.

Also, Schwentker contends that the district court committed error requiring reversal in refusing to give two jury instructions that she requested: one regarding conspiratorial intent and the other regarding multiple conspiracies. However, Schwentker's appellate briefs did not specify where in the record we can find these requested instructions. We will not do Schwentker's work for her, and without the text of the requested instructions, we cannot meaningfully review the district court's refusal to give them.

XVII.

Finally, as conceded by the government, Schwentker is entitled to be resentenced due to a *Booker* error. Schwentker is not entitled, however, to the automatic imposition of the alternative sentence announced by the district court. The district court did not provide sufficient explanation of its consideration of the Guidelines and the 18 U.S.C. § 3553(a) factors to enable us to determine whether the alternative sentence is reasonable. *See Till*, 434 F.3d at 887.

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form related to your client."

XVIII.

For the foregoing reasons, we affirm Tamara Schwentker-Harris's conspiracy conviction but vacate her sentence and remand for resentencing consistent with *Booker*.

XIX.

Unlike Schwentker, defendant Kotula does not contend that his convictions are against the manifest weight of the evidence. Kotula does argue, however, that the evidence presented at trial was insufficient to support finding him guilty beyond a reasonable doubt of conspiracy to defraud the IRS in violation of 18 U.S.C. § 371 (count one) or tax evasion in violation of 26 U.S.C. § 7206 (count five). We disagree. Kotula plausibly shows how a jury could conclude that he was not knowingly involved in the conspiracy and did not know he was violating federal tax law, but the jury was within its rights to credit the government's interpretation of the evidence over his.

We review de novo the denial of a motion for acquittal. *Tran*, 433 F.3d at 475. We reverse only if, "after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Johnson*, 440 F.3d at 839. "We are bound to make all reasonable inferences and credibility choices in support of the jury's verdict." *Id.* Moreover, our "general hesitancy to disturb a jury verdict applies with even greater force" where, as here, the district court has already denied a motion for

acquittal. *Lee*, 359 F.3d at 418-19.

Nonetheless, there must be substantial evidence on each of the elements of the offense from which a jury could find Schwentker guilty beyond a reasonable doubt. Substantial evidence "must do more than create a suspicion of the existence of the fact to be established." *Hoxie*, 419 F.3d at 482. In this context, substantial evidence is "more than a mere scintilla. It [is] such relevant evidence as a reasonable mind might accept to support a conclusion. It is evidence affording a substantial basis of fact from which the fact in issue can be reasonably inferred." *Orrico*, 599 F.2d at 117.

To prove that Kotula was guilty of the conspiracy alleged in count one, the government did not have to prove that he violated some substantive statute (such as tax evasion). *US v. Douglas*, 398 F.3d 407, 412 (6th Cir.2005) (citation omitted). Rather, to establish a conspiracy in violation of 18 U.S.C. § 371, the government had to show that (1) two or more people agreed to accomplish an illegal objective against the U.S.; (2) the defendant willfully became a member of the conspiracy; (3) one of the conspirators thereafter knowingly committed at least one overt act at about the time and place alleged in the indictment; and (4) that overt act was knowingly done in furtherance of some object or purpose of the conspiracy. *Beverly*, 369 F.3d at 532.

As to the first element, proof of a formal agreement is not necessary; a "tacit or material understanding among the parties" will suffice. *US v. Martinez*, 430 F.3d 317, 330 (6th Cir.2005) (citation omitted), *cert. denied sub nom. Harris v.*

US, --- U.S. ----, 126 S.Ct. 1603, 164 L.Ed.2d 324 (2006). The existence of a conspiracy may be inferred from circumstantial evidence that can reasonably be interpreted as participation in the common plan. *Id.* As to the second and third elements, a defendant's knowledge of and voluntary participation in the conspiracy may be inferred from his conduct and established by circumstantial evidence. *Id.* Once the government establishes a conspiracy beyond a reasonable doubt, defendant's connection to it need only be "slight." *Id.*

A conspiracy conviction does not require proof that a defendant was an active participant in every phase or aspect of the conspiracy, *Beverly*, 369 F.3d at 532, nor does it require proof that he played more than a minor role in the scheme, so long as he understands the conspiracy's essential nature and intentionally joins it. *US v. Warner*, 690 F.2d 545, 550 (6th Cir.1982). The defendant need only know of the conspiracy, associate himself with it, and knowingly contribute his efforts towards its furtherance. *Beverly*, 369 F.3d at 532.

Kotula first argues that there was no direct evidence that he conspired with Harris to evade federal taxes, as the district court acknowledged. Specifically, he alleges that there was no evidence that he was an officer or director of any corporation listed in the indictment, that he was a trustee or other officer of any trust except his own, or that he received any economic benefit from the real-estate transactions in the case. Nor was there any evidence that Kotula was involved with the National Coin Exchange, Harris's and Schwentker's offshore bank accounts, or any of Harris's allegedly abusive trusts: "Kotula was simply a

property manager collecting rents, repairing buildings, and helping to get a bankrupt amusement park on its feet." Rather, Kotula argues, the government obtained his conviction through speculation, innuendo, and "guilt by association" with Harris and Harris's prior convictions.

After pointing out the lack of direct evidence, Kotula assails the evidence and testimony that the government did present. First, Kotula asserts that the only basis for considering him the CEO of Harris's GH Group was the handwritten organizational chart, introduced as GX 452, with no authentication or showing of relevance and foundation.

Second, in contrast to the claim that he was "directly and deeply involved" in Harris's allegedly fraudulent conveyance of the amusement park to a trust, Harris's former attorney, Lawrence Bolla, testified that he had contact with Kotula only with regard to "administrative things" and "cleanup details" for the transaction. Kotula also contests the allegation that he "was deeply involved in Harris's successful efforts to pressure the trustees into a 'settlement' " and drafted the settlement himself. Kotula points again to Gregg's testimony that Kotula was not an officer, shareholder, or trustee of any corporation or trust, did not come up with the idea of conveying the park to a trust, "had no control or independent authority," and merely typed up the settlement after Gregg wrote it by hand on a legal pad.

Third, Kotula argues that, although the government cites four witnesses as testifying that they "considered Kotula to have virtual second-in-command authority regarding the GH Group's legal affairs," none of those witnesses mentioned the GH Group.

Kotula mounts other attacks on specific pieces of evidence, but he does not support any of them by quotation, summary, or discussion of the testimony in question: Agent Hendrickson's testimony does not support the claim that Kotula was CEO of GH Group; Agent Torbic's testimony does not support the claim that Kotula, as CEO, knew about Harris's storage facility; Watson's testimony did not support the claim that Kotula likely understood the tax-evading purpose of Harris's transfer of the park to a trust; and Kornblau's and Freedman's testimony do not support the claim that Kotula co-mingled assets.

Kotula is correct that the organizational chart showing him as CEO as the GH Group should not be considered, because it was never authenticated and so should not have been admitted. Even without that chart, however, the evidence was sufficient to permit a reasonable jury to find the elements of his conspiring with Harris beyond a reasonable doubt.

Attorney Bolla, who represented Harris in connection with his conveyance of the park to the Trustees of Conneaut Lake Park, testified that Kotula "was Gary [Harris]'s right hand man" and was actively involved in the closing. Although Bolla characterized his contacts with Kotula as dealing with "administrative things," he also said that he "took a lot of directives from Mike Kotula, in terms of what entity was going to buy the park, and what entity was going to own the liquor license, and what entity may operate the park...." *Id.*

Also testifying about Kotula's role in Harris's

operations was attorney Watson, who advised Harris of different ways to transfer the park out of his name, created the Trustees of Conneaut Lake Park, and advised him in connection with a mortgage foreclosure dispute and local tax matters involving the park. Watson stated that Kotula was present when Harris signed the paperwork to create the Trustees and convey the park to the Trustees. Watson described Kotula as Harris's "right hand man" and recalled that Kotula "would often be the one communicating or informing me of matters, or relaying matters to Mr. Harris" regarding the park's local taxes, negotiation of the mortgage foreclosure, and other matters involving the park. Significantly, Watson testified that, although Harris said that he was the ultimate decisionmaker, "Mr. Harris had informed me that I could rely upon whatever Mr. Kotula had said."

George Peters, an attorney for the City of Cleveland who had worked full-time as Harris's counsel from 1994-97, also testified. Peters stated that "I would receive instructions from Mr. Harris and from Mike Kotula on different cases or matters that needed to be handled." Peters also recalled that Kotula served as the office and property manager; if Peters had questions, he normally went to Kotula first.

Also testifying was attorney Baker, who represented Harris in real-estate litigation from 1998-2001. Baker "dealt with Mr. Kotula almost exclusively" and regularly communicated with him in person and by phone. Moreover, it was Kotula who usually requested that Baker perform legal work. Significantly, Baker stated that Kotula handled some of the litigation and real estate matters for Harris while

Harris was incarcerated. (The government cites the testimony of Emanuel, Harris's former brother-in-law, but that testimony is of little or no utility on this score.)

In the same vein was the testimony of Swift, who worked during the conspiracy period as general manager for Harris's company, Sharp & Fellows. Swift recalled his understanding that Kotula managed Harris's Ohio office, was Swift's "supervisor," and gave Swift "[b]usiness advice, accounting questions, assistance. Requests for checks to make payments on bills.... Advisement [sic] on contracts that were larger than average for us."

Agent Hendrickson testified that Kotula served as the intermediary between Harris and Hendrickson as Hendrickson tried to assemble Harris's OBD-500 financial statement.

Whether it is strictly accurate to call Kotula the "CEO" of GH Group, the evidence of Kotula's extensive involvement with Harris's businesses, tax matters, and litigation, and the degree of trust and authority that Harris reposed in Kotula, could support the inference that Kotula was aware of the 1992 IRS search of Harris's home and offices, 1995 tax evasion conviction, 1997 plea to additional tax charges, and the 1999 IRS search of Harris's storage facility.

More telling, the evidence supported the inference that Kotula knew that many of Harris's companies were mere nominal entities that maintained nothing more than bank statements and check registers, used merely to shift funds around for unusual, unexplained, or false purposes and

thereby camouflage income ownership and tax liability. *US v. Nwabardi,* 159 Fed.Appx. 547, 551-52 (5th Cir.2005) ("Irregular business practices or an unexplained deviation from the ordinary course of business can provide circumstantial proof of one's participation in the conspiracy itself.").

The evidence also supports the inference that Kotula was aware of the tax-evading purpose animating Harris's transfer of the park to the Trustees. *See US v. Bieganowski,* 313 F.3d 264, 277-78 (5th Cir.2002) (emphasizing that defendant was the de facto manager of coconspirator's business, in which fraudulent practices were widespread and not kept secret from those on the inside).

To convict Kotula for tax evasion in violation of 26 U.S.C. § 7201, the government had to prove beyond a reasonable doubt that (1) there was a tax deficiency, i.e. a tax due and owing by Kotula, (2) Kotula committed an affirmative act of evasion or attempted evasion of that tax, and (3) Kotula willfully violated the tax law. *US v. Benson,* 79 Fed.Appx. 813, 824 (6th Cir.2003).

The evidence against Kotula on the tax-evasion count is not overwhelming, either in absolute terms or compared to the conspiracy evidence against him. But it is sufficient to support his tax-evasion conviction under the very deferential standard for reviewing jury verdicts.

In 1998, Kotula sold his own land to Ashtabula County, Ohio for $425,000. The sale contract recited that Kotula was selling the land to avoid eminent domain. Kotula made a $382,000 profit on the sale, on which he

owed federal income tax of $82,000. The parties agree that Kotula did not list the profit on his 1998 federal income tax return.

The government charged that Kotula's failure to report the land-sale gain in that year constituted willful attempted evasion. Kotula's defense is that 26 U.S.C. § 1033 allows a taxpayer to defer gain from a sale made under threat of eminent domain if they use the proceeds to buy replacement property within a certain period of time. As Agent Fisher testified, if the taxpayer meets the requirements, he is not required to report the gain in the first year following the sale.

The government alleges that "several Ashtabula County officials" testified that the land-sale agreement's references to eminent domain were a "sham," but the government fails to point to particular testimony using that word. The government relies on the testimony of current and former county commissioners that the county never suggested that it was considering using eminent domain to take Kotula's land, that it was Kotula alone who insisted on inserting the eminent-domain language, that the commissioners knew eminent domain was unpopular and so would not use it lightly, and that the county had probably not used eminent domain in the twenty years prior to the county's purchase of Kotula's land. The government concludes,

> [i]n light of the testimony from the IRS accounting expert and the Ashtabula County officials, the jury had compelling reasons to determine that Kotula concocted a phony paper trail to create the

> appearance that he qualified for tax deferral under 26 U.S.C. 1033 and thereafter filed a false tax return that understated income and taxes due-a classic form of attempted income tax evasion. The tax evasion motive for Kotula's conduct was self-evident, and therefore his ***521** bad-faith insertion of eminent domain language into the paper trail of the real estate transaction, conduct ... likely ... to mislead or conceal, plainly qualified as a willful act of evasion. The inference of willfulness was fortified by the evidence of Kotula's sophistication in business administration and accounting.

In response to the allegation that Kotula "inserted" the eminent-domain language into the land-sale agreement, Kotula notes that former County Commissioner Condron testified that he did not know who drafted the agreement, while County Commissioner Boggs testified that the county attorney drafted it.

Kotula also responds that he conducted the sale and tax compliance openly and properly:

> [T]he prosecutor's contention that Kotula "concocted a phony paper trail" (U.S. Br. at 32) is absurd. None of the documentation relating to the sale was challenged for authenticity or legitimacy. The agreement was signed by the County Commissioners on advice of the County Prosecutor. The extensions to obtain replacement property were authorized and testified to by IRS Agent Listerman. The title work and IRS Form 1099S were testified to by the title company representative who assisted Kotula in

> finding legal counsel. There was nothing fraudulent or concealing. Everything was conducted in a public forum. No reasonable jury could infer willful intent.

Kotula says there is no evidence that the county advised him that it would not use eminent domain or that it considered the eminent-domain language to be superfluous.

Moreover, the title company reported the gain on Form 1099S, which Kotula signed. *Id.* Kotula emphasizes that he consulted counsel about how to treat the gain, and he contacted IRS Agent Listerman to secure extensions of time in which to buy replacement property. (The three-year period to obtain replacement property did not expire until August 2002, and Kotula began corresponding with the IRS about an extension in April 2002.)

Lastly, Kotula points to the district court's statement that there was no evidence that the sale did not qualify for tax-deferral under 26 U.S.C. § 1033.

On this record, a reasonable factfinder could find that it was not reasonable to fear eminent domain under the circumstances. With or without such a finding, the factfinder could conclude that Kotula did not actually have a good-faith belief (reasonable or otherwise) that his property was threatened by eminent domain so as to trigger the deferred-reporting provision of IRC § 1033.

XX.

Next, Kotula contends that the jury

> [i]nstructions relating to Count 5, tax evasion, and the tax deferred exchange were erroneous. .... Despite Kotula's request, the jury was not instructed that '[a] sale of property is made under threat of condemnation if the taxpayer has *reasonable grounds* to believe the property eventually will be condemned. [JA] 429. The district court refused to give this instruction and instead instructed that:
>
> > If a taxpayer sells property to the government under threat of or imminence thereof of eminent domain [sic], the taxpayer may defer reporting any capital gains incurred from the sale of that property pursuant to 26, United States Code, Section 1033. Otherwise, any capital gains incurred from the sale of that property must be reported by the taxpayer the same tax year as the sale. [JA] 4193.

Kotula points to IRS Revenue Ruling 63-221, which provides that a threat or imminence of eminent domain exists when "the property owner has reasonable grounds to believe ... that the necessary steps to condemn the property will be instituted if a voluntary sale is not arranged." *See, e.g., Murray v. CIR,* 1965 WL 1112 (Tax Ct.1965), *aff'd,* 370 F.2d 568 (4th Cir.1967).

Kotula also references IRS Revenue Ruling 81-180, which states that a sale to someone other than the potential eminent-domain authority also qualifies as a § 1033 deferred exchange if made by a "taxpayer having reasonable grounds to believe the necessary steps to condemn the property eventually would have been instituted...." (There are no

federal decisions on WestLaw that interpret Rev. Ruling 81-180.)

The government cites *Byrum v. US*, 440 F.2d 949, 952 (6th Cir.1971), *aff'd*, 408 U.S. 125, 92 S.Ct. 2382, 33 L.Ed.2d 238 (1972), for the proposition that Revenue Rulings do not have the force of law, are not entitled to the same deference as a statute or regulation, and may be disregarded if they conflict with the statute they purport to interpret. But "[r]evenue rulings do ... constitute precedents to be used in the disposition of other cases. .... Revenue rulings also serve as official interpretation[s] by the IRS of the tax laws." *Aeroquip-Vickers, Inc. v. CIR*, 347 F.3d 173, 181 (6th Cir.2004) (internal quotation marks and citation omitted).

We review a properly preserved objection to a jury instruction by determining "whether the charge, taken as a whole, fairly and adequately submits the issues and applicable law to the jury." *Blood*, 435 F.3d at 623. We may vacate a judgment of conviction due to faulty jury instruction only if the instructions, viewed as a whole, "were confusing, misleading, or prejudicial." *Id.*

Although a jury instruction alleged to be faulty on a question of law is reviewed de novo, "the failure to provide a requested jury instruction, as a matter within the trial court's discretion, is reviewed for abuse of discretion." *Blood*, 435 F.3d at 623 (citation omitted). Harmless errors are disregarded. *Blood*, 435 F.3d at 623 (citing Fed.R.Crim.P. 52(a)).

A district court must instruct the jury on the

defendant's theory of the case " 'if the theory has some support in the evidence and the law,' but not where the instruction is 'based on speculation.' " *Blood,* 435 F.3d at 623 (quoting *US v. Morgan,* 216 F.3d 557, 566 (6th Cir.2000)).

We reverse only if the proposed instruction is correct, is not substantially covered by the charge actually given, "and is so important that failure to give it substantially impairs the defense." *Blood,* 435 F.3d at 623-24. Reversal is not warranted whenever reasonable jurors *could have* interpreted the instructions in a way that led them to convict, even though the jurors found that defendants had a good-faith belief that they were complying with the tax laws. "[T]he proper inquiry is not whether the instruction 'could have' been unconstitutionally interpreted, but whether there is a *reasonable likelihood* that the jury did so interpret it...." *Perry,* 438 F.3d at 651 (emphasis added).

Kotula is correct that the instruction given on count five is a prejudicially incomplete statement of the law, but the instruction requested by Kotula is also incomplete. The jury instruction given on count five, tax evasion, did not "fairly and adequately submit[ ] the issues and applicable law to the jury," *Blood,* 435 F.3d at 623, and Kotula was prejudiced by the error. Following the instruction given, there is a "reasonable likelihood" that the jurors convicted Kotula of tax evasion based solely on their finding that the circumstances did ***523** not indicate a threat that the county would use eminent domain to take his land. In other words, there is a reasonable likelihood that the jury convicted based on an objective standard.

A proper and complete instruction would include Kotula's emphasis on "reasonable grounds" to fear eminent domain, but it would not stop there. The district court should have instructed the jury that the issue is whether Kotula *had a good-faith belief* that there were reasonable grounds to fear that the county would exercise eminent domain. This may sound cumbersome, but it is the only way to capture both the Supreme Court's definition of tax-law willfulness and the Revenue Rulings' reasonable-grounds standard for § 1033 deferral.

Even assuming there was strong evidence that Kotula did *not* have a good-faith belief that there were reasonable grounds to fear eminent domain,[7] the jury did not know that

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[7] A court should not give a requested instruction, even if it accurately states the law, if it lacks evidentiary support. *Morgan*, 216 F.3d at 566; *US v. Tandon*, 111 F.3d 482, 490 (6th Cir.1997). But the government fails to show that the jury *had to* find that a reasonable grounds-to-fear-eminent-domain instruction had no evidentiary support. The government asserts that

> the evidence at trial demonstrated that Kotula did not have a reasonable basis to believe that condemnation of his property was imminent. The testimony relating to Kotula's commercial property sale established beyond question that his buyer, Ashtabula County, had not even hinted at the possible exercise of eminent domain to acquire his property; instead, the County witnesses revealed that the references to eminent domain in the sales contract had been inserted by Kotula, not the County, and that the County had never planned to condemn Kotula's building.

But the testimony cited merely *could* support the conclusion that

was the question at hand. Therefore, Kotula is entitled to a new trial at which the jury will know what the government must prove to convict him of tax evasion in connection with the land sale.[8]

XXI.

On the issue of Harris's prior federal tax plea, the district court instructed the jury:

> You have heard some evidence related to Defendant Gary Harris' 1997 plea agreement with the United States of America. This plea agreement in no way prevents the United States from proceeding with the charges alleged in this indictment. You may, however, consider the facts and circumstances surrounding the plea agreement, financial statement [From OBD-500], and income affidavit in evaluating his intent.

Kotula argues that this instruction

Kotula did not believe there were reasonable grounds to fear eminent domain; it did not *compel* that conclusion. For example, reasonable jurors are free to find that the commissioners lacked credibility, i.e., that they actually did intend or expect to exercise eminent domain over Kotula's land. Alternately, the jurors could believe the commissioners' testimony that they did not intend or expect to exercise eminent domain, but find that Kotula believed otherwise.

[8] This obviates the need to consider Kotula's other challenges to his tax evasion conviction.

> effectively granted judgment for the government on the issue of Kotula's good faith reliance on Harris's plea agreement as having resolved all tax issues for the years 1994 through 1996. The instruction effectively precluded the jury from construing the plea agreement and Kotula's reliance on it as evidence that Kotula was not involved in any conspiracy in regard to the years covered by the plea agreement because of his good faith reliance on the plea agreement as resolving tax issues relating to those years.... Since much of the government's case hinged on the alleged false affidavit provided by Harris, the government's conspiracy charge would have been undermined, at least as to Kotula, if the instruction regarding the plea agreement had not been given. Accordingly, [Kotula's] conviction on Count 1 should be reversed.

But Kotula misleadingly quotes only the phrase "This plea agreement in no way prevents the United States from proceeding with the charges alleged in the indictment."

Considering the entire instruction in context, Kotula's argument lacks merit. The instruction sufficiently advised the jury to consider the possibility that Harris believed that his 1997 plea resolved all his federal tax liabilities for the years covered. If the jury so found, it would conclude that Harris lacked the intent to conspire to evade his taxes for those years. The jury then would have to conclude that Kotula could not have conspired with Harris to evade Harris's taxes for those years.

XXII.

Like Schwentker, Kotula contends that the district court abused its discretion by trying him together with Harris. We reject this argument for the reasons stated in our discussion of Schwentker's severance motion.

XXIII.

As conceded by the government, Kotula is entitled to be resentenced due to *Booker* error. It would not be appropriate, however, to simply impose the alternative sentence previously announced by the district court. The district court did not sufficiently explain its consideration of the Guidelines and the 18 U.S.C. § 3553(a) factors to enable us to determine whether Kotula's alternative sentence is reasonable. *See Till,* 434 F.3d at 887. Because Kotula is entitled to a new trial on count five (tax evasion) and *Booker* resentencing on count one (conspiracy), we do not address his other assignments of sentencing error.

XXIV.

For the foregoing reasons, we affirm Kotula's conspiracy conviction but vacate his tax-evasion conviction due to an erroneous jury instruction. Kotula is entitled to a new trial on the tax-evasion charge and to *Booker* resentencing on the conspiracy conviction.

XXV.

In summary, we affirm Harris's conspiracy and tax-evasion convictions, but we remand for resentencing

consistent with *Booker* and with this opinion's interpretation of the tax-loss, relevant-conduct, and obstruction-of-justice guidelines. We affirm Schwentker's conspiracy conviction but remand for resentencing consistent with *Booker*. Lastly, we affirm Kotula's conspiracy conviction but vacate his tax-evasion conviction; we remand for a new trial on Kotula's tax-evasion charge and for resentencing on the conspiracy conviction consistent with *Booker*.

Filed
April 19, 2007
Leonard Green,
Clerk

No. 04-4030

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee	)	
	)	
v.	)	
	)	
MICHAEL J. KOTULA,	)	ORDER
	)	
Defendant-Appellant	)	

BEFORE: MOORE, GRIFFIN, and CUDAHY,* Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

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* Hon. Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green

Leonard Green, Clerk

DECLARATION OF GARY HARRIS

Gary Harris states as follows:

1. I am a defendant in the case captioned United States of America v. Gary Harris, et al., Case No. 1:03CR264, pending in the United States District Court for the Northern District of Ohio, Eastern Division. Co-defendants in the case are Michael J. Kotula and Tamara Schwentker Harris.

2. I understand that co-defendant Michael J. Kotula would like to call me as a witness in this case. While I am not presently willing to testify in a joint trial of all defendants, I am willing to testify at a separate trial of Mr. Kotula, regardless of whether that trial is held prior to or after my trial. I will not invoke my Fifth Amendment privilege against self-incrimination in a separate trial of Mr. Kotula.

3. If permitted to testify in a separate trial of Mr. Kotula, I would testify that:

a. Mr. Kotula was an employee of several companies owned by me;

b. Mr. Kotula had no decision-making authority in regard to the finances of any entity in which I had any involvement;

c. Mr. Kotula had no ownership interest in any business with me;

d. Mr. Kotula acted strictly pursuant to orders and directions from myself in

regard to actions he took while employed by myself or an entity in which I had an interest;

e. Mr. Kotula had no involvement in any of the criminal conduct which gave rise to my prior federal convictions;

f. Mr. Kotula paid attorneys strictly at my direction;

g. I retained accountants and attorneys and Mr. Kotula had no responsibility to prepare or file tax returns for any entity in which I had an interest;

h. Mr. Kotula had no knowledge or involvement in the creation of the offshore accounts referenced in the indictment;

i. Mr. Kotula had absolutely no involvement with the creation of any trusts that are affiliated with either me or my family as beneficiaries;

j. Mr. Kotula was not an officer of any of my affiliated companies during the period of the alleged conspiracy nor was he involved in their creation, unless it was by assisting in some minor form of paperwork filing, which would have been solely done at my request as his employer;

k. JMJ & Associates, Inc. was Mr. Kotula's corporation and any expenses paid out for me, or on my behalf, out of his property management company checkbook would have been at my direction from the funds I had authorized him to collect for me from rental receipts of properties which I managed;

l. Mr. Kotula never had check signing authority with any of my affiliated entities during the period of the alleged conspiracy until I requested him to open an account under GZT, Inc. to help me after I was incarcerated and additionally when he agreed to help manage Group Maintenance's oil wells, by adding himself on to the account with David Emanuel when Mr. Emanuel resigned in January of 2000, with no one left to operate the wells for me.

4. I understand that attorneys for Mr. Kotula intend to request that the Court grant him a separate trial so that I may be a witness. I am willing to testify at a hearing on that motion so that the Court may be fully aware of the testimony I would provide at a separate trial for Mr. Kotula.

5. I make this statement after careful consideration and consultation with my own counsel.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 28, 2003.

s/ Gary Harris
GARY HARRIS

18 U.S.C. §371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Federal Rule of Criminal Procedure 14 provides:

(a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

(b) Defendant's Statements. Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

show Mr. Harris's intent in relation to both the conspiracy count to defraud the United States, and the three tax evasion counts, your Honor.

THE COURT: All right. And are you offering it solely against Mr. Harris at this point?

MR. LIVERMORE: Your Honor, I don't have any evidence that, you know, these trusts were – that anyone other than Mr. Harris had a relationship with these trusts.

THE COURT: All right. Does anyone else wish to be heard before I go forward, please?

MR. KERGER: Just briefly, your Honor.

As part of the stipulation, the government has asked us to consider from August of 1993 through the present, Mr. Carpa has been incarcerated in federal prison and I would suggest that certainly would indicate a lack of any opportunity to communicate with Mr. Harris. Others might be able to do it, it's not Mr. Carpa.

Thank you, your Honor.

MR. ROTATORI: Well, I assume, your Honor – may I address the court?

THE COURT: Yes, please.

MR. ROTATORI: I assume, your Honor, since the government's last presentation to the court a

your Honor.

THE COURT: As to Mr. Kotula?

MR. ROTATORI: Yes.

THE COURT: Well, I'll have to go back and check the record.

MR. ROTATORI: There were three previous limiting instructions, had to do with evidence that solely applied to Mr. Harris and not the other defendants.

THE COURT: Well, all right. At this point in time, sir, let me rule as to the admissibility and then we'll address the issue of limiting instruction. And quite frankly, I'm not sure that my intention is give a limiting instruction but my belief is that it is, in all likelihood, not even necessary, given the state of evidence. And there is no evidence to tie Mr. Kotula to these trusts. It's pretty clear. I think it is going to be pretty clear and obvious to the to the jurors at this point.

But let me address the issue first and then we'll decide on the limiting instruction as to Mr. Kotula and Miss Schwentker Harris.

First of all, for the record, I have reviewed the evidence so far submitted in this case,

that belong to Mr. Harris. We have a commingling because he also has his own building in there.
Q. Did he pay out more money than he collected?
A. I don't know that.
Q. So you don't know if the commingling affected anything unless you conduct that analysis, correct?
A. Correct.
Q. All right. Aside from that instance, did you see any other instance where as a result of corporate transfers and trust transfers, Mr. Kotula received any economic benefit?
A. Based on some of the records that had been admitted, there were loans back and forth in regards to income, no, but there were loans.
Q. Did he receive any – economic benefit with regard to the issue of income?
A. No.
Q. All right. You saw no corporate records in the evidence that indicates Mr. Kotula was either an officer or a director of any other corporations listed in the indictment?
A. Correct.
Q. You saw no trust documents that is in evidence in this case that Mr. Kotula was either a trust or trustee or trust manager or a fiduciary in any way relative to those trusts?

A. Could you repeat that, please?
Q. Of all the documents relative to the trusts involved in this case that had been introduced into this case, you have seen no documents that indicate Mr. Kotula was either a trustee, trust manager or fiduciary relative to any of those trusts?
A. Only JMJ.
Q. That's his own trust, though, right?
A. But that was one of the items introduced.
Q. Well, certainly with regard to his own trust, he was the trustee. With regard to any of the other trusts?
A. No.
Q. All right.

MR. ROTATORI: Thank you very much, sir.

THE COURT: Mr. Whitaker, you may inquire, please.

MR. WHITAKER: Thank you, Your Honor.

CROSS EXAMINATION OF JAMES FISHER BY MR. WHITAKER:
Q. Good morning.

THE COURT: Afternoon.

BY MR. WHITAKER:
Q. Afternoon. They all run together.

You understand I am Bill Whitaker. I represent Tamara.

declaration that they were made under penalties of perjury, and which the defendants did not believe to be true and correct as to every material matter. This is essential.

An agreement can be proved indirectly, by facts and circumstances which lead to a conclusion that an agreement existed. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

One more point about the agreement. The indictment accuses the defendants of conspiring to commit several federal crimes. The government does not have to provide that the defendants agreed to commit all these crimes. But the government must prove an agreement to commit at least one of them for you to return a guilty verdict on the conspiracy charge.

Defendants' connection to the conspiracy. If you are convinced that there was a criminal agreement, then you must decide whether the government has proved that the defendants knowingly and voluntarily joined that agreement. You must consider each defendant separately in this regard. To convict any defendant, the government must prove that he or she knew the conspiracy's main purpose, and that he or she voluntarily joined it intending to help advance or achieve its goals.

This does not require proof that a defendant

knew everything about the conspiracy, or everyone else involved, or that he or she was a member of it from the very beginning. Nor does it require proof that a defendant played a major role in the conspiracy, or that his or her connection to it was substantial. A slight role or connection may be enough.

But proof that a defendant simply knew about a conspiracy, or was present at times, or associated with members of the group, is not enough, even if he or she approved of what was happening or did not object to it. Similarly, just because a defendant may have done something that happened to help a conspiracy does not necessarily make him or her a conspirator. These are all things that you may consider in deciding whether the government has proved that a defendant joined a conspiracy. But without more, they are not enough.

What the government must prove is that a defendant knew the conspiracy's main purpose, and that he or she voluntarily joined it intending to help advance or achieve its goals. This is essential.

A defendant's knowledge can be proved indirectly by facts and circumstances which lead to a conclusion that he or she knew the conspiracy's main purpose. But it is up to the government to convince you that such facts and circumstances existed in this

In order to show an "attempts in any manner to evade or defeat any tax," therefore, the government must prove beyond a reasonable doubt that Defendant Gary Harris and/or Defendant Michael Kotula intended to evade or defeat the tax due and that those said defendants also willfully did some affirmative act in order to accomplish this intent to evade or defeat that tax.

Willfully, defined. In order to sustain its burden of proof for the crimes of attempted income tax evasion as charged in Counts 1, 2 – I'm sorry, Counts 2, 3, 4 and 5 of the indictment, the government must prove beyond a reasonable doubt that Defendant Gary Harris and/or Defendant Michael Kotula acted willfully.

To act willfully means to act voluntarily and deliberately and intending to violate a known legal duty. Negligent conduct is not sufficient to constitute willfulness.

Tax deficiency. One element of attempted tax evasion is a substantial tax deficiency. A substantial tax deficiency is a substantial amount of federal income tax due and owing over and above the amount of tax reported in the defendants' returns. Each year must be considered separately. In other words, the defendants' tax obligation in any one year must be determined separately from his tax obligation in any other year.

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U.S. District Court
Akron

UNITED STATES DISTRICT COURT
Northern District of Ohio

UNITED STATES OF AMERICA
V.
Michael J. Kotula

JUDGMENT IN A CRIMINAL CASE

Case Number
1:03CR264-02

USM Number 54412-060

Robert Rotatori & Susan Gragel
Defendant's Attorney

THE DEFENDANT:
X was found guilty on count(s) one and five after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense**	**Count**
18 U.S.C. § 371	Conspiracy to Commit Tax Evasion		1
26 U.S.C. § 7201	Attempted Tax Evasion		5

The defendant is sentenced in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 22, 2004 original sentence and
July 23, 2004 alternative sentence

/s/ John R. Adams
Signature of Judge

John R. Adams, U.S. District Judge
Name and Title of Judge

8-2-04
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

60 months as to Count 1 and 10 months term as to Count 5 to be served consecutively. Alternative Sentence under the Statutory Provisions in the event of the Unconstitutionality of the Sentencing Guidelines. 4 years custody as to each Count to be served concurrently with each other for a total of 4 years custody. All other aspects of original sentence imposed apply.

The court makes the following recommendations to the Bureau of Prisons:

The Court recommends incarceration at Morgantown, W.V.

The execution of the sentence is deferred and bond continued. The defendant shall surrender:

as notified by the United States Marshal or the designated institution.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

3 years.

The defendant must report to the probation office in the district to which the defendant is

released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and

complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the Probation Officer.

The defendant shall fully cooperate with the Internal Revenue Service and comply with his obligation to pay all taxes due and payable.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$200.00	$100,000.00	$82,806.83

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Internal Revenue Service		$82,806.83	
TOTALS	$82,806.83		

*Findings for the total amount of loss are required under Chapters 109A, 110, 110A, and 113A of

Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

Special instructions regarding the payment of criminal monetary penalties:

A special assessment of $200.00 is due in full immediately as to count(s) one and five.

PAYMENT IS TO BE MADE PAYABLE AND SENT TO THE CLERK, U.S. DISTRICT COURT.

*Should the defendant be unable to pay the $100,000.00 fine immediately, the balance shall be paid at the minimum rate of 15% of the defendant's gross monthly income.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The defendant shall pay the cost of prosecution joint and several with Defendant Gary Harris in the amount of $19,211.42.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including costs of prosecution and court costs.

DEFENDANTS' PROPOSED INSTRUCTION NO. 7: "Willfully"—Defined; Good Faith.

In order to sustain its burden of proof for the crime of conspiracy, the government must prove beyond a reasonable doubt that defendant acted "willfully".

To act willfully means to act voluntarily and deliberately and intending to violate a known legal duty.

If the defendant acted in good faith, that is to say he actually believed the actions he took were allowable by law, then he is not guilty of conspiracy. It does not matter whether the defendant was right or wrong in his belief, nor does it matter if his belief makes sense or sounds reasonable to you. The only thing that matters is whether or not the defendant actually believed he was correct in his actions.

Also, it is not the defendant's burden to prove that he did believe his actions were correct, but rather it is the government's burden to prove that he did not. It

is for you, the jury, to decide whether the government has proven that the defendant knowingly and willfully attempted to violate the law as the indictment alleges by proving beyond a reasonable doubt that he did not actually believe his actions were correct.

2B Fed. Jury Prac. & Instr. § 67.20 (5th ed.); Cheek v. United States, 498 U.S. 192 (1991).

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No. 07-67

FILED
OCT 17 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

MICHAEL J. KOTULA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
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Acting Assistant Attorney General
ALAN HECHTKOPF
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QUESTIONS PRESENTED

1. Whether the admission of excerpts of civil deposition transcripts under the co-conspirator exception to the hearsay rule was consistent with the Confrontation Clause of the United States Constitution.

2. Whether the district court erred in declining to sever petitioner's trial from that of a co-defendant.

3. Whether the district court erred in declining to give a separate instruction on the good-faith defense to a criminal tax prosecution.

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In the Supreme Court of the United States

No. 07-67

MICHAEL J. KOTULA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 52-165) is not published in the Federal Reporter but is reprinted in 200 Fed. Appx. 472.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 2006. A petition for rehearing was denied on April 19, 2007 (Pet. App. 166-167). The petition for a writ of certiorari was filed on July 16, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the Northern District of Ohio, petitioner was found guilty of one count of conspiracy to defraud the Internal Revenue Service (IRS) and

to commit tax crimes, in violation of 18 U.S.C. 371, and one count of attempting to evade income tax, in violation of 26 U.S.C. 7201. Pet. App. 53. The court of appeals affirmed petitioner's conspiracy conviction, vacated his tax-evasion conviction, and vacated his sentence. *Id.* at 164.

1. In 1985, petitioner began working for Gary Harris, the owner of a network of businesses known as the "GH Group." Pet. App. 54. Petitioner acted as Harris's "right-hand man," and he had managerial authority throughout the GH Group. *Ibid.* Harris operated his businesses through a maze of shell corporations and "trusts" that he controlled using nominee officers, directors, and owners who were loyal to him. *Ibid.* He colluded with a promoter of abusive offshore "trusts" and "untaxing" packages to enhance the secrecy of his business operations. *Ibid.* In addition, he acquired "bank accounts" with the Natural Coin Exchange, a "warehouse bank" operated by an anti-tax organization known as the Christian Patriot Association. *Id.* at 55. Harris himself did not file income tax returns, and many of his "trusts" and shell corporations did not do so either. *Ibid.* Between 1995 and 2000, his companies earned hundreds of thousands of dollars in unreported income each year. *Ibid.*

2. A federal grand jury in the Northern District of Ohio returned an indictment charging petitioner, Harris, and Tamara Schwentker-Harris with conspiracy to defraud the IRS, in violation of 18 U.S.C. 371. Pet. App. 57. The indictment also charged Harris with three counts of tax evasion and petitioner with one count of tax evasion, in violation of 26 U.S.C. 7201. *Ibid.*

Before trial, petitioner moved to sever his case from those of his co-defendants, asserting that he wished to

call Harris as a witness on his behalf, and that Harris would be willing to testify only if the trials were severed. Pet. App. 32. The district court denied the motion, finding that Harris did not have "a true desire to testify" but was simply seeking to "cause delay." *Id.* at 36.

3. At trial, the government introduced transcripts of Harris's depositions from civil litigation in a Pennsylvania state court. Pet. App. 153. In those transcripts, Harris discussed some of his business enterprises, and he mentioned petitioner's role in the businesses. *Id.* at 138-142. The district court admitted the transcripts as statements by a co-conspirator in furtherance of the conspiracy under Federal Rule of Evidence 801(d)(2)(E). Pet. App. 135-136.

The district court instructed the jury that to find any defendant guilty of conspiracy, the jury had to be convinced beyond a reasonable doubt that the government had proved an agreement to unlawfully, willfully, and knowingly attempt to evade taxes due, or to unlawfully, willfully, and knowingly submit false income tax returns, and that the defendant had knowingly and voluntarily joined the conspiracy. Pet. App. 177. The court further instructed the jury that "[t]o act willfully means to act voluntarily and deliberately and intending to violate a known legal duty." *Id.* at 179. Petitioner requested that the jury be instructed that a defendant's good faith is a defense to a charge of tax evasion, but the district court declined to give such an instruction. *Id.* at 3.

The jury returned a verdict of guilty on all counts, and the district court denied petitioner's post-verdict motion for a judgment of acquittal. Pet. App. 1-51. Petitioner was sentenced to 60 months of imprisonment. *Id.* at 58.

4. The court of appeals affirmed petitioner's conspiracy conviction, vacated his tax-evasion conviction, and vacated his sentence, remanding for resentencing. Pet. App. 52-165.

The court of appeals held that Harris's deposition transcripts were properly admitted because Harris intended to use the deposition "to help restore his control" of the assets that were at issue in the litigation and thereby "regain a tool that had been useful to him and the alleged conspiracy." Pet. App. 143. Because the statements in the deposition were made in furtherance of the conspiracy, they were properly admitted under Rule 801(d)(2)(E). *Id.* at 144. The court of appeals also held that the district court did not abuse its discretion in denying a severance, because petitioner had failed to show that a joint trial had resulted in "substantial prejudice" to his defense. *Id.* at 145 (quoting *United States* v. *Beverly*, 369 F.3d 516, 534 (6th Cir.), cert. denied, 543 U.S. 910 (2004)). And the court held that petitioner's requested instruction on good faith was unnecessary because the district court's willfulness instruction "adequately advised the jury of the *mens rea* element" of the offenses. *Id.* at 94.

The court of appeals concluded that petitioner was entitled to a new trial on his tax-evasion conviction. Pet. App. 162. That conviction was based on petitioner's failure to report a capital gain on a sale of land; petitioner claimed that the land was about to be condemned and that he had sold it to avoid eminent domain, thus allowing him to defer the gain under 26 U.S.C. 1033 (Supp. IV 2004). Pet. App. 154-155. The court of appeals concluded that the district court had erred in failing to instruct the jury that a good-faith belief that there were reasonable grounds to fear eminent domain would be a

defense to the charge. *Id.* at 161. Additionally, the court concluded that petitioner was entitled to resentencing under *United States* v. *Booker*, 543 U.S. 220 (2005). Pet. App. 164. The court therefore remanded for a new trial on the tax-evasion charge and for resentencing. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-30) that the district court erred in admitting Harris's deposition transcripts, denying a severance, and refusing to give a separate jury instruction on good faith. The court of appeals correctly rejected those arguments. Its decision is consistent with the decisions of this Court, and petitioner fails to demonstrate any conflict between the decision below and that of any other court of appeals. Further review is not warranted.

1. As an initial matter, this Court's review is unwarranted at this time because the court of appeals vacated petitioner's sentence and remanded to the district court for a new trial on one of the charges and for resentencing, so the case is still in an interlocutory posture. This Court routinely denies petitions by parties challenging interlocutory determinations that may be reviewed at the conclusion of the proceedings. See, *e.g.*, *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). That practice ensures that all of a defendant's claims will be consolidated and presented in a single petition. Here, the interests of judicial economy would be best served by denying review now and allowing petitioner to reassert his claims at the conclusion of the proceedings, if he still wishes to do so at that time.

2. Petitioner claims (Pet. 6-16) that the decision of the court of appeals affirming the admission of excerpts of Harris's civil deposition transcripts under Federal Rule of Evidence 801(d)(2)(E) contravenes this Court's ruling in *Crawford* v. *Washington*, 541 U.S. 36 (2004). That claim does not warrant this Court's review, particularly because it was not explicitly addressed by the court of appeals and was not raised in the district court.[1]

The challenged deposition transcripts resulted from civil litigation involving Harris and the charitable trust to which he had "donated" an amusement park that he owned. As the court of appeals explained, the district court could reasonably have found that Harris intended

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[1] At trial, petitioner objected to the introduction of the transcripts on the ground that Harris's statements were not made in furtherance of a conspiracy, but he did not specifically raise a Confrontation Clause objection. Gov't C.A. Br. 50; see *Untied States* v. *Chau*, 426 F.3d 1318, 1321-1322 (11th Cir. 2005) (hearsay objection is insufficient to preserve a Confrontation Clause claim); *United States* v. *Dukagjini*, 326 F.3d 45, 60 (2d Cir. 2003) (same), cert. denied, 541 U.S. 1092 (2004). Petitioner states (Pet. 16 n.8) that he objected to the Harris deposition testimony "on the ground that it deprived him of the right of cross-examination," but the supporting record citation does not bear out that contention; it establishes only that, in the court of appeals, petitioner *asserted* that he had preserved his claim. Pet. App. 136-137 (quoting Pet. C.A. Br. 37-38). Moreover, the record citations on which petitioner relied in the court of appeals (Pet. C.A. Reply Br. 15 n.4) demonstrate that, in opposing the admission of the transcripts, petitioner never mentioned the Confrontation Clause or his cross-examination rights. Because petitioner's claim of constitutional error was not preserved, it was subject to review for plain error only. See Fed. R. Crim. P. 52(b). Petitioner could prevail only if the error under *Crawford* were "obvious." *Johnson* v. *United States*, 520 U.S. 461, 467 (1997). In light of the uniform holdings of the courts of appeals that *Crawford* does not bar the admission of co-conspirator statements, see note 2, *infra*, petitioner could not make that showing.

to advance the tax-fraud conspiracy through his depositions, since Harris, by prevailing in the lawsuits, would retain operational control over the amusement park. Pet. App. 142. The court recognized that control of the park was important to the conspiracy, since it was a major source of cash for Harris and was virtually audit-proof. *Ibid.* The court therefore held that the deposition testimony was properly admitted under Rule 801(d)(2)(E), and it did not separately address petitioner's claim that its admission contravened *Crawford*'s prohibition of "testimonial hearsay." *Id.* at 136, 143-144.

The admission of the transcripts was consistent with *Crawford*. The principal evil that the Confrontation Clause addresses is the government's use of *ex parte* accusatory statements made in the context of a criminal investigation and prosecution. See *Crawford*, 541 U.S. at 50. Although the Court did not define "testimonial hearsay" in *Crawford*, see *id.* at 68 n.10, it strongly suggested that certain well established categories of non-hearsay, including Rule 801(d)(2)(E) statements, do not constitute "testimonial hearsay" and thus are not subject to the requirement of actual confrontation, see *id.* at 56. Accordingly, the courts of appeals that have addressed the issue have held uniformly that statements properly admitted under Rule 801(d)(2)(E) are not "testimonial hearsay."[2]

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[2] See, *e.g.*, *United States* v. *Ramirez*, 479 F.3d 1229, 1249 (10th Cir. 2007); *United States* v. *Larson*, 495 F.3d 1094, 1099 n.4 (9th Cir. 2006) (en banc); *United States* v. *Carson*, 455 F.3d 336, 365 (D.C. Cir. 2006), cert. denied, 127 S. Ct. 1351 (2007); *United States* v. *Sullivan*, 455 F.3d 248, 258 (4th Cir. 2006); *United States* v. *Martinez*, 430 F.3d 317, 329 (6th Cir.), cert. denied, 547 U.S. 1034 (2006); *United States* v. *Jenkins*, 419 F.3d 614, 618 (7th Cir.), cert. denied, 546 U.S. 1051 (2005); *United States* v. *Robinson*, 367 F.3d 278, 292 n.20 (5th Cir.), cert. denied, 543

The fact that Harris's statements were "testimonial" in the sense of being made under oath does not, by itself, mean that their use at trial would violate the Confrontation Clause. The deposition was not part of an "interrogation[] by law enforcement officers," *Crawford*, 541 U.S. at 53, and Harris was not an "accuser" making "a formal statement to government officers," *id.* at 51. Rather, his deposition was taken in civil litigation to which the government was not a party. And Harris made the statements not for the purpose of providing information for government enforcement efforts but for the purpose of furthering a criminal conspiracy of which he was a part. Such a conspiratorial agenda is a far cry from the testimonial statements that implicate the Confrontation Clause. Cf. *Davis* v. *Washington*, 126 S. Ct. 2266, 2273-2274 (2006) (distinguishing between statements made to the police for the primary purpose of establishing or proving past events relevant to criminal prosecution, which are testimonial, and statements made in interrogation for the purpose of enabling "police assistance to meet an ongoing emergency," which are not).

U.S. 1005 (2004); *United States* v. *Reyes*, 362 F.3d 536, 540-541 & n.4 (8th Cir.), cert. denied, 542 U.S. 945 (2004). Although none of these cases involved co-conspirator statements in the form of deposition testimony, that consideration is not dispositive. See p. 8, *infra*. Cf. *United States* v. *Stewart*, 433 F.3d 273, 291-292 (2d Cir. 2006) (allowing the admission of co-conspirators' statements in formal interviews with government investigators because they were primarily "offered for purposes other than to establish the truth of the matter asserted" and "the truthful portions of the testimonial statements were made in furtherance of a conspiracy to obstruct justice"); but cf. *United States* v. *Holmes*, 406 F.3d 337, 348-350 (5th Cir.) (expressing uncertainty as to whether civil deposition transcripts admitted under Rule 801(d)(2)(E) were "testimonial," but finding it unnecessary to resolve the issue), cert. denied, 546 U.S. 871 (2005).

Petitioner asserts (Pet. 12) that the decision of the court of appeals "is contrary to the decisions of several other federal courts." He cites two such decisions, but neither is from a court of appeals, and thus neither establishes a conflict requiring resolution by this Court. See *United States* v. *Saner*, 313 F. Supp. 2d 896 (S.D. Ind. 2004), and *United States* v. *W.R. Grace*, 455 F. Supp. 2d 1199 (D. Mont. 2006). At least one of the decisions, moreover, is distinguishable from this case. In *Saner*, the district court excluded from evidence certain inculpatory statements an alleged conspirator had made to a federal prosecutor who was seeking "to gather evidence against [the defendants] to be used at trial." *Saner*, 313 F. Supp. 2d at 901. The government did not invoke Rule 801(d)(2)(E) as a basis for the admissibility of the statements. See *id.* at 898. More importantly, the statements in *Saner* were obtained by the federal prosecutor for use in the very case he was assembling. Here, by contrast, the statements at issue were made in the course of civil litigation between private parties in state court, and the government had no involvement in their production.

Even if the admission of the transcripts were contrary to *Crawford*, review by this Court still would not be warranted because any error did not prejudice petitioner, particularly given that, on plain-error review, see note 1, *supra*, petitioner bears the burden to show prejudice. See *United States* v. *Olano*, 507 U.S. 725, 735 (1993) (defendant who raises a forfeited claim must show an effect on his substantial rights); *Lee* v. *Illinois*, 476 U.S. 530, 547 (1986) (Confrontation Clause violation is subject to harmless-error review). Petitioner argues (Pet. 15) that Harris's testimony was prejudicial because it "fingered" him as an "administrative assistant" for a

number of Harris entities and as part of the amusement park management team. But long before petitioner was "fingered" in Harris's deposition transcripts, he already had been identified, in the unchallenged testimony of several witnesses, as a manager of the amusement park. Pet. App. 151-154. Harris's statement that "I think [petitioner] was with [the management team] early," *id.* at 138, added nothing of substance to the government's case. And Harris's statement that petitioner was an "administrative assistant" for some of his companies added nothing to petitioner's own characterization of himself as the vice-president of operations for the GH Group—and as one who was responsible for the review, drafting, and administration of GH Group contracts, and the "legal administration and secured financing" of GH Group companies. Gov't C.A. Br. 25.

3. Petitioner also contends (Pet. 16-20) the district court should have severed his trial from those of his co-defendants. The court of appeals correctly rejected that claim. This Court has emphasized that "[t]here is a strong preference in the federal system for joint trials of individuals who are indicted together." *Zafiro* v. *United States*, 506 U.S. 534, 537 (1993). A severance is appropriate "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539. And the "determination of risk of prejudice and any remedy that may be necessary" is committed "to the sound discretion of the district courts." *Id.* at 541. As the court of appeals explained, petitioner has not come close to showing that the district court abused its discretion here. Pet. App. 144-146.

Petitioner's argument rests (Pet. 17) on a declaration supplied by his co-defendant Harris that listed various "exculpatory" statements that Harris would make as a witness for petitioner in the event that Harris's trial were severed from petitioner's trial. Noting that petitioner's severance motion was untimely, Pet. App. 32, and that Harris had made repeated efforts to delay the trial, including by filing several frivolous motions, *id.* at 35-36, the district court concluded that Harris's declaration "was not based on a true desire to testify but was merely a tactic to once again cause delay," *id.* at 36. That finding—which petitioner does not address here—was by itself a sufficient basis for denying the motion to sever.

In any event, even had Harris been genuinely willing to testify, petitioner would not have been entitled to a severance. According to petitioner (Pet. 19-20), the proffered testimony would have established that he had no decision-making responsibility for the finances of any Harris entity; that he acted strictly according to orders and directions from Harris; and that he had no involvement in the creation of Harris's offshore accounts, trusts, or affiliated companies. But none of the proffered testimony would have negated petitioner's involvement in the tax-fraud conspiracy. Petitioner's argument rests on the unstated premise that a conspirator who lacks a financial stake in the agreement, or is unaware of important acts in furtherance of the agreement, or was only following orders, cannot be guilty of conspiracy. That premise is false. See, *e.g.*, *Salinas* v. *United States*, 522 U.S. 52, 63-65 (1997) (defendant need not participate in all aspects of a conspiracy or agree personally to commit criminal acts); *Blumenthal* v. *United States*, 332 U.S. 539, 557 (1947) (defendant may become

member of conspiracy without knowing all details of unlawful scheme); *United States* v. *Brandon*, 17 F.3d 409, 438 (1st Cir.) (in prosecution for conspiracy and bank fraud, rejecting "just following orders" defense in light of defendant's intent to participate in scheme), cert. denied, 513 U.S. 820 (1994); *United States* v. *Warner*, 690 F.2d 545, 550 (6th Cir. 1982) (defendant may become member of scheme even if he agrees to play only minor role). The lack of any truly exculpatory content in Harris's proposed testimony undermines the suggestion that this case falls within the narrow exception to the strong federal policy for joint trials.

The absence of prejudice from the denial of a severance is underscored by consideration of the serious credibility problems that Harris would have had as a witness. Based on his relationship with petitioner, see Gov't C.A. Br. 25-26, and his virulent anti-tax beliefs, see Pet. App. 54-55, Harris would have been subject to obvious impeachment for bias. And before petitioner's prosecution began, Harris had sustained four recent felony convictions for crimes of deceit—three for tax evasion and one for racketeering. See *id.* at 56. Those facts also would have been used to impeach Harris. Petitioner suggests (Pet. 20) that the district court could not consider Harris's lack of credibility in ruling on the motion to sever, but in evaluating the probable effect of the proffered evidence, the court necessarily had to consider whether the jury was likely to believe it. See *United States* v. *DiBernardo*, 880 F.2d 1216, 1229 (11th Cir. 1989) (in context of motion to sever, approving trial court's consideration of credibility of proffered testimony); *Byrd* v. *Wainwright*, 428 F.2d 1017, 1021 (5th Cir. 1970) (same).

Petitioner errs in suggesting (Pet. 17-20) a circuit conflict on the standards for severing trials of co-conspirators. He cites only one decision post-dating *Zafiro*, and in that case, the Eleventh Circuit held that the district court did not abuse its discretion in granting a severance, where the alleged co-conspirators offered to testify that the defendant was not involved in a conspiracy with him. See *DiBernardo*, 880 F.2d at 1228-1229. Here, in contrast, Harris's testimony was not exculpatory, and Harris had extreme credibility problems. Nothing in the fact-specific holding of *DiBernardo* suggests that the Eleventh Circuit would have required the district court to grant a severance in this case.

4. Finally, petitioner contends (Pet. 21-30) that the court of appeals erred in affirming the district court's denial of a jury instruction on good faith. Petitioner is mistaken.[3]

The district court instructed the jury that the government was required to show that petitioner acted willfully, and that "[t]o act willfully means to act voluntarily and deliberately and intending to violate a known legal duty." Pet. App. 179. The court of appeals concluded that "the instructions adequately advised the jury of the *mens rea* element" necessary to support petitioner's

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[3] Although petitioner requested an instruction on good faith, he expressly limited that request to the tax-evasion charge. Petitioner's present assertion (Pet. 21 n. 12) that he proposed a good-faith instruction with regard to the conspiracy count is unfaithful to the record of the jury charge conference, during which he unambiguously and emphatically stated that his proposed instruction related only to the tax-evasion count. Gov't C.A. Br. 69; Pet. App. 3-4. Because the court of appeals reversed petitioner's tax-evasion conviction, the instructions pertaining to that count are not relevant here, and petitioner's challenge to the instructions on the conspiracy count is subject to review for plain error only.

conspiracy conviction. *Id.* at 94. The court determined that by convicting petitioner of conspiracy, the jury necessarily rejected the possibility that petitioner had acted in good faith. *Ibid.*

The decision of the court of appeals is entirely consistent with this Court's decisions. In *United States* v. *Bishop*, 412 U.S. 346 (1973), this Court interpreted the term "willfully," for criminal tax offenses, to require "a voluntary or intentional violation of a known legal duty." *Id.* at 360; see *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) (per curiam). In *Cheek* v. *United States*, 498 U.S. 192 (1991), the Court explained that "the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable." *Id.* at 202. In other words, "one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist." *Ibid.* As this Court has observed, an instruction on a criminal tax defendant's alleged good faith thus adds nothing to a proper instruction on willfulness. See *id.* at 201; *Pomponio*, 429 U.S. at 12.

The decision of the court of appeals is also consistent with the approach taken by other circuits. In the criminal fraud setting, for example, nearly every circuit court of appeals has held that the district court need not instruct on good faith if its other instructions adequately inform the jury of the specific intent needed to support conviction.[4]

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[4] See, *e.g.*, *United States* v. *Nivica*, 887 F.2d 1110, 1124 (1st Cir. 1989), cert. denied, 494 U.S. 1005 (1990); *United States* v. *Evangelista*,

Only the Tenth Circuit has held that it is reversible error not to give a separate good-faith instruction when a defendant raises a defense of good faith. See *United States* v. *Harting*, 879 F.2d 765 (10th Cir. 1989). Its decision is nearly 20 years old, and, like the other circuits that once required a separate good-faith instruction, the Tenth Circuit may well reconsider its position. Compare, *e.g.*, *United States* v. *Regan*, 937 F.2d 823 (2d Cir. 1987), amended, 946 F.2d 188 (2d Cir. 1991), cert. denied, 504 U.S. 940 (1992), with *United States* v. *Evangelista*, 122 F.3d 112, 118 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998); compare *United States* v. *Morris*, 20 F.3d 1111 (11th Cir. 1994), with *United States* v. *Walker*, 26 F.3d 108, 110 (11th Cir. 1994). This Court has repeatedly denied review in cases raising the same issue as that presented by petitioner here. See, *e.g.*, *Lewis* v. *United States*, 534 U.S. 814 (2001) (No. 00-1605); *Bates* v. *United States*, 520 U.S. 1253 (1997) (No. 96-7731); *Von Hoff* v. *United States*, 520 U.S. 1253 (1997) (No. 96-6518).

Petitioner points (Pet. 24-25) to decisions of the Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, which, he says, conflict with the court of appeals' decision on the question "whether a good faith instruction setting forth the government's burden is required in a

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122 F.3d 112, 118 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998); *United States* v. *Gross*, 961 F.2d 1097, 1103 (3d Cir.), cert. denied, 506 U.S. 965 (1992); *United States* v. *Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994); *United States* v. *Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994), cert. denied, 514 U.S. 1084 (1995); *United States* v. *Sassak*, 881 F.2d 276, 280 (6th Cir. 1989); *United States* v. *Verkuilen*, 690 F.2d 648, 655-656 (7th Cir. 1982); *United States* v. *Ervasti*, 201 F.3d 1029, 1041 (8th Cir. 2000); *United States* v. *Dorotich*, 900 F.2d 192, 193-194 (9th Cir. 1990); *United States* v. *Walker*, 26 F.3d 108, 110 (11th Cir. 1994); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981).

tax case." But none of the cases that he cites holds that a separate good-faith instruction is necessary if the district court has already given a proper instruction on the state of mind necessary for conviction.

Petitioner suggests (Pet. 26-27) that the district court "expressly excluded" the conspiracy count from the coverage of its definition of willfulness, with the result that the jury was deprived of an instruction on an essential element of the offense. Even if petitioner were correct, that case-specific issue would not warrant review. In any event, petitioner misinterprets the district court's instructions. In delivering its instructions on the elements of tax evasion, the court stated that "[i]n order to sustain its burden of proof for the crimes of attempted income tax evasion as alleged in Counts 1, 2—*I'm sorry, Counts 2, 3, 4, and 5* of the indictment, the government must prove that [petitioner] acted 'willfully.'" Pet. App. 179. Petitioner claims (Pet. 27 n.15) that the italicized language constitutes the court's "express exclusion" of the willfulness definition from Count 1. A more reasonable reading of the instruction, however, is that the court was merely specifying parenthetically those counts of the indictment that charged tax evasion: Counts 2-5, but not Count 1. With regard to the conspiracy count, the court repeatedly informed the jury that to find petitioner guilty, it had to find that he had knowingly and voluntarily joined an agreement to "willfully" evade taxes or file false tax returns. Pet. App. 177. The court of appeals appropriately rejected petitioner's strained interpretation of the jury charge. *Id.* at 94.

Finally, petitioner maintains (Pet. 28) that in the interest of consistency, the reversal of his tax-evasion conviction should have resulted in the reversal of his con-

spiracy conviction as well. The tax-evasion conviction was based on evidence that petitioner had concocted a sham transaction in order to take advantage of the deferral-of-gains provisions of 26 U.S.C. 1033 (Supp. IV 2004). The district court instructed the jury that Section 1033 applied only if "a taxpayer sells property to the government under threat * * * of eminent domain." Pet. App. 158. The court of appeals reversed, relying on an IRS Revenue Ruling that it read for the proposition that Section 1033 applies whenever "the property owner has reasonable grounds to believe" that the property may be subject to eminent domain. *Ibid.* Even assuming that that is a correct statement of the law, it has nothing to do with the *mens rea* necessary for a conspiracy conviction. And as the court of appeals recognized earlier in its opinion, "the instructions adequately advised the jury of the *mens rea* element. By convicting [petitioner] of conspiracy to defraud the IRS (and by convicting [petitioner] of tax evasion), the jury necessarily found [he] did not have a good-faith belief that [he was] not violating the tax laws." *Id.* at 94.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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